No. 96-8732

In The

Supreme Court of the United States

October Term, 1997

VINCENT EDWARDS, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition For Certiorari Filed April 21, 1997
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Relevant Docket Entries*

VINCENT EDWARDS, et al., v. UNITED STATES
NO. 96-8732

Date	Proceedings
	United States District Court, N.D. Illinois Case No. 93-CR-20024
7/27/93	Indictment filed.
11/23/93	Superseding Indictment filed.
4/12/94	Memorandum Opinion and Order granting defendants; motions to sever, in part, and denying them in part. Defendants Karl Fort, Joseph Tidwell, Reynolds A. Wintersmith, Vincent Edwards and Horace Joiner to be tried together.
6/27/94	Jury trial begins.
7/15/94	Jury instructed and begins deliberating.
7/18/94	Jury returns verdicts of guilty on Counts 1 (all defendants), 4 (Reynolds Wintersmith and Vincent Edwards), 5 and 6 (Joseph Tidwell).
11/21/94	Joint portion of sentencing hearing held.
	Judgment in a Criminal Case against Karl V. Fort (Count 1). $50 special assessment. Life imprisonment to be followed by five years' supervised release, should the laws change and the defendant is ever released. $2,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

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* Entries edited for clarity and completeness.

11/22/94 Judgment in a Criminal Case against Horace Joiner (Count 1). $50 special assessment. 126 months' imprisonment to be followed by five years' supervised release. $1,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

Judgment in a Criminal Case against Vincent Edwards (Counts 1 and 4). $100 special assessment. 120 months' imprisonment on both counts to run concurrently, to be followed by five years' supervised release. $1,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

11/23/94 Judgment in a Criminal Case against Reynolds A. Wintersmith (Counts 1 and 4). $100 special assessment. Life imprisonment on Count 1 to run concurrently with 40 years' imprisonment on Count 4, and to be followed by five years' supervised release, should the laws change and the defendant is ever released. $1,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

11/29/94 Notice of Appeal by Vincent Edwards. [7th Cir. No. 94-3805.]

12/1/94 Notice of Appeal by Reynolds A. Wintersmith. [7th Cir. No. 94-3833.]

12/15/94 Notice of Appeal by Horace Joiner. [7th Cir. No. 94-3952.]

12/16/94 Notice of Appeal by Karl V. Fort. [7th Cir. No. 94-3953.]

1/18/95 Judgment in a Criminal Case against Joseph Tidwell (Counts 1, 5 and 6). $150 special assessment. 252 months' imprisonment on Count 1 to run concurrently with 240 months' imprisonment on Count 5, and consecutively to 5 years' imprisonment on Count 6, and to be followed by five years' supervised release. $1,000 fine. Denial of federal benefits, statement of reasons, and excerpt of sentencing hearing transcript attached to judgment.

2/7/95 Notice of Appeal by Joseph Tidwell. [7th Cir. No. 95-1358.]

United States Court of Appeals
for the Seventh Circuit
Case Nos. 94-3805, 94-3833, 94-3952,
94-3953 & 95-1358

2/21/95 Order consolidating cases for purposes of briefing and disposition.

12/2/96 Oral argument.

1/30/97 Opinion entered affirming the judgments of the district court.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 93 CR 20024
KARL VINCENT FORT,	)	Violations: Title 18,
also known as "Short Dog,"	)	United States Code,
also known as "Short,"	)	Sections 922(g) and
HELEN LOUISE FORT,	)	924(c), and Title 21,
also known as "Helen Moton,"	)	United States Code,
SAMUEL TIDWELL,	)	Sections 841(a)(1)
also known as "Big Dude,"	)	and 846
also known as "Big Ride,"	)	SUPERSEDING
GREG FORT,	)	INDICTMENT
also known as "G Money,"	)	
also known as "G,"	)	(Filed
MONTIE L. RUSSELL,	)	Nov. 23, 1993)
also known as "Big Montie,"	)	
MICHAEL GILLESPIE,	)	
also known as "Big Mike,"	)	
also known as "Big Daddy,"	)	
DONALD RAY BOX,	)	
also known as "Big Don,"	)	
JOSEPH TIDWELL,	)	
also known as "Reno,"	)	
MARCUS O. EVANS,	)	
also known as "High Yellow,"	)	
also known as "Yellow,"	)	
RANDY HORTON,	)	
also known as "Ready Red,"	)	
FITZGERALD MOORE,	)	
also known as "Fitz,"	)	
also known as "Fritz,"	)	

HORACE JOINER,	)
also known as "Jackpot,"	)
BRENDA THOMPSON,	)
WILLIE LOCKETT,	)
also known as "Clock Man,"	)
DEXTER HAMMOND,	)
also known as "Dex,"	)
DECARLES McGHEE,	)
also known as "Litey,"	)
REGINALD D. PURVIS,	)
also known as "Reggie,"	)
REYNOLDS A. WINTERSMITH,	)
also known as "Bezel,"	)
VINCENT EDWARDS,	)
also known as "Shanks," and	)
GLORIA DEAN HOLMES	)

COUNT ONE

The FEBRUARY 1993 GRAND JURY charges:

1. From at least 1989, and continuing to at least July 28, 1993, at Rockford, in the Northern District of Illinois, Western Division, and elsewhere,

KARL VINCENT FORT,
also known as "Short Dog,"
also known as "Short,"
HELEN LOUISE FORT,
also known as "Helen Moton,"
SAMUEL TIDWELL,
also known as "Big Dude,"
also known as "Big Ride,"
GREG FORT,
also known as "G Money,"
also known as "G,"
MONTIE L. RUSSELL,
also known as "Big Montie,"

MICHAEL GILLESPIE,
also known as "Big Mike,"
also known as "Big Daddy,"
DONALD RAY BOX,
also known as "Big Don,"
JOSEPH TIDWELL,
also known as "Reno,"
MARCUS O. EVANS,
also known as "High Yellow,"
also known as "Yellow,"
RANDY HORTON,
also known as "Ready Red,"
FITZGERALD MOORE,
also known as "Fitz,"
also known as "Fritz,"
HORACE JOINER,
also known as "Jackpot,"
BRENDA THOMPSON,
WILLIE LOCKETT,
also known as "Clock Man,"
DEXTER HAMMOND,
also known as "Dex,"
DECARLES McGHEE,
also known as "Litey,"
REGINALD D. PURVIS,
also known as "Reggie,"
REYNOLDS A. WINTERSMITH,
also known as "Bezel,"
VINCENT EDWARDS,
also known as "Shanks,"

defendants herein, did conspire with each other and with others known and unknown to the Grand Jury knowingly and intentionally to possess with intent to distribute and to distribute mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, and cocaine base, a

Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was the object of the conspiracy for the defendants, as members or affiliates of the Gangster Disciples street gang, to profit from the illegal sales of large quantities of powder and crack cocaine by purchasing powder cocaine in kilogram and lesser quantities, cooking the powder cocaine into crack cocaine, and selling both powder and crack cocaine at numerous distribution sites controlled by them in Rockford, Illinois and elsewhere.

3. It was a part of the conspiracy that the defendants obtained and attempted to obtain large quantities of cocaine in powder form from a variety of suppliers.

4. It was further a part of the conspiracy that the defendants "cooked" the powder cocaine, using coffee pots and other devices, at various locations in Rockford, Illinois, to convert the powder cocaine into cocaine base, otherwise known as "crack" or "rock" cocaine.

5. It was further a part of the conspiracy that the defendants packaged powder and crack cocaine into miniature ziplock bags and corners of clear plastic sandwich-size baggies, sometimes referred to as "dime bags," for street-level sales. The defendants then grouped 50 of these dime bags into "packs," "packets" or "PKs" for distribution to runners and dealers.

6. It was further a part of the conspiracy that the defendants acted and recruited others to act as "runners" to deliver the packs of powder and crack cocaine to "workers" at numerous houses and sites in Rockford, Illinois and elsewhere (hereinafter "distribution sites").

7. It was further a part of the conspiracy that the defendants sold and recruited other workers to sell street-level quantities of powder and crack cocaine at numerous distribution sites.

8. It was further a part of the conspiracy that the defendants acted and recruited others to act as "look-outs" near and in the distribution sites in order to provide warnings when the police or other individuals were in the area.

9. It was further a part of the conspiracy that the defendants established and used daily "shifts" of runners and workers at distribution sites in order to maintain the continuous sale of powder and crack cocaine over a twenty-four hour period.

10. It was further a part of the conspiracy that the defendants possessed and used digital display pagers, telephones and cellular telephones to notify each other when a powder or crack cocaine distribution site needed to be resupplied or to have money picked up, or when the defendants needed to otherwise communicate with each other regarding obtaining, possessing, cooking, packaging and distributing powder cocaine and crack cocaine.

11. It was further a part of the conspiracy that the defendants oftentimes communicated in code by entering certain predesignated numbers into a digital display pager which identified the location of a distribution site and other predesignated numbers to signal that more powder cocaine or crack cocaine was needed or that money should be picked up.

12. It was further a part of the conspiracy that at times the defendants distributed powder and crack cocaine in quantities larger than street level-quantities or dime bags.

13. It was further a part of the conspiracy that the defendants used coded language when talking to each other on the telephone in order to avoid detection and apprehension by law enforcement authorities.

14. It was further a part of the conspiracy that the defendants used their membership in or affiliation with the Gangster Disciples street gang to maintain order within the conspiracy and that the defendants used beatings and fines to punish members or affiliates of the Gangster Disciples street gang and other individuals.

15. It was further a part of the conspiracy that the members of the conspiracy used force and violence and their membership in or affiliation with the Gangster Disciples street gang to intimidate and to drive out competing distributors of powder and crack cocaine from the Gangster Disciples street gang's "turf" or "territory".

16. It was further a part of the conspiracy that the defendants used and caused others to use force and violence and threats of force and violence to collect payment for sales of powder cocaine and crack cocaine.

17. It was further a part of the conspiracy that the defendants used and possessed firearms in order to protect and further the goals and objectives of the conspiracy.

18. It was further a part of the conspiracy that when members of the conspiracy were arrested on various

charges, the defendants would notify each other of the arrest, provide money to be used to bond out arrested members, place money in the jail expense account of arrested members, obtain and pay for attorneys for arrested members, and provide each other with law enforcement agencies reports, records, affidavits and warrants obtained by the arrested members.

19. It was further a part of the conspiracy that when members of the conspiracy were arrested on various charges, defendants would exert and attempt to exert control over the arrested members in an attempt to discourage cooperation with law enforcement authorities.

20. It was further a part of the conspiracy that when members of the conspiracy were being sought by law enforcement authorities, defendants would assist in hiding the sought after members of the conspiracy from law enforcement authorities.

21. It was further a part of the conspiracy that the defendants misrepresented, concealed and hid, and caused to be misrepresented, concealed and hidden the purposes of and the acts done in furtherance of the conspiracy described herein, and used surveillance and counter surveillance techniques, and other means to avoid detection and apprehension by law enforcement authorities and otherwise to provide security for members of the conspiracy.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

The FEBRUARY 1993 GRAND JURY further charges:

On or about January 15, 1993, at Rockford, in the Northern District of Illinois, Western Division,

KARL VINCENT FORT,
also known as "Short Dog,"
also known as "Short,"

defendant herein, knowingly and intentionally did distribute and cause to be distributed approximately .30 grams of a mixture containing cocaine base, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

* * *

COUNT FOUR

The FEBRUARY 1993 GRAND JURY further charges:

On or about April 22, 1993, at Rockford, in the Northern District of Illinois, Western Division,

VINCENT EDWARDS,
also known as "Shanks," and
REYNOLDS WINTERSMITH,
also known as "Bezel,"

defendants herein, knowingly and intentionally did possess with the intent to distribute approximately 5.32 grams of mixtures containing cocaine base, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT FIVE

The FEBRUARY 1993 GRAND JURY further charges:

On or about April 30, 1993, at Rockford, in the Northern District of Illinois, Western Division,

JOSEPH TIDWELL,
also known as "Reno,"

defendant herein, knowingly and intentionally did possess with the intent to distribute approximately .7 grams of mixtures containing cocaine base, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT SIX

The FEBRUARY 1993 GRAND JURY further charges:

On or about April 30, 1993, at Rockford, in the Northern District of Illinois, Western Division,

JOSEPH TIDWELL,
also known as "Reno,"

defendant herein, during and in relation to a drug trafficking crime, namely the offenses described in Counts One and Five of this indictment, knowingly used and carried a firearm, namely:

a .45 caliber Haskell, model JS-45, semi-automatic pistol, serial number 022923;

In violation of Title 18, United States Code, Section 924(c).

* * *

In the United States District Court
for the Northern District of Illinois,
Western Division

(Caption Omitted In Printing)

* * *

Jury Instructions

Defendants Karl Vincent Fort, Joseph Tidwell, Horace Joiner, Reynolds Wintersmith, and Vincent Edwards are charged in Count One of the indictment with conspiring to possess with the intent to distribute and to distribute cocaine and cocaine base.

Defendants Reynolds Wintersmith and Vincent Edwards are charged in Count Four of the indictment with possessing approximately 5.32 grams of mixtures containing cocaine base with the intent to distribute on April 22, 1993.

Defendant Joseph Tidwell is charged in Count Five of the indictment with possessing approximately .7 grams of mixtures containing cocaine base with the intent to distribute on April 30, 1993.

Defendant Joseph Tidwell is charged in Count Six of the indictment with using and carrying a firearm during and in relation to the conspiracy charged in Count One of the indictment and the possession of cocaine base with intent to distribute charged on Count Five of the indictment.

Each defendant has denied that he is guilty of the charges contained in the indictment.

* * *

In order to establish the offense of conspiracy as charged in Count One of the indictment, as to each defendant the government must prove these elements beyond a reasonable doubt:

First, that the alleged conspiracy existed; and

Second, that the defendant knowingly and intentionally became a member of the conspiracy.

If you find from your consideration of all the evidence that each of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

A conspiracy is a combination of two or more persons to accomplish an unlawful purpose. A conspiracy may be established even if its purpose was not accomplished.

In determining whether the alleged conspiracy existed, you may consider the acts and statements of all the alleged participants.

To be a member of the conspiracy, the defendant need not join at the beginning or know all the other members or the means by which the purpose was to be

accomplished. The government must prove beyond a reasonable doubt, from the defendant's own acts and statements, that he was aware of the common purpose and was a willing participant in the charged conspiracy.

Only each defendant's own words and acts show whether that particular defendant joined the conspiracy. You may consider statements by other persons to decide what a particular defendant did or said, or to help you understand that particular defendant's acts and statements.

If you decide that a defendant joined the conspiracy, you may consider the statements by other persons in order to decide questions that are pertinent to the other accusations against the defendant.

A defendant charged with conspiracy can be convicted, in the alternative, as an aider and abettor of that conspiracy.

A person can be guilty of aiding and abetting a conspiracy when the person commits an act in furtherance of the conspiracy, provided the person had knowledge of the conspiracy's existence at the time of his acts, and intended by his actions to aid the conspiracy. One can aid and abet a conspiracy without necessarily participating in the original agreement. One who aids and abets a conspiracy is culpable as a principal.

If you find that a defendant was a member of the conspiracy charged in Count One of the indictment at anytime within the period alleged, it is not a defense to that charge that the defendant later attempted to withdraw from the conspiracy.

You are hereby instructed as a matter of law that conspiracy to possess with the intent to distribute cocaine and cocaine base and possession of cocaine base with the intent to distribute are drug trafficking crimes as that term is used in these instructions.

You are instructed as a matter of law that cocaine and cocaine base are Schedule II Narcotic Drug Controlled Substances.

The indictment charges in Count One that the defendants conspired to possess with the intent to distribute and to distribute cocaine and cocaine base and in Counts Four and Five that a certain amount of cocaine base was possessed with the intent to distribute.

The government does not have to prove that the alleged conspiracy involved an exact amount of cocaine or cocaine base. Neither does the government have to prove that the exact amount of cocaine base charged in the indictment was possessed with the intent to distribute. However, the government must prove that the conspiracy and the possession charges involved measurable amounts of cocaine or cocaine base.

* * *

APPENDIX VERDICT FORMS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	No. 93 CR 20024
v.	)	Judge Philip G. Reinhard
VINCENT EDWARDS	)	

VERDICT

(Filed Jul 18, 1994)

We, the jury find the defendant, VINCENT EDWARDS, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles R. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 Jul 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

(Caption Omitted In Printing)

No. 93 CR 20024
Judge Philip G. Reinhard

VERDICT

(Filed July 18, 1994)

We, the jury find the defendant, VINCENT EDWARDS, GUILTY of the drug possession with intent to distribute charge contained in Count Four of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles K. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 Jul 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	No. 93 CR 20024
v.	)	Judge Philip G. Reinhard
KARL VINCENT FORT	)	

VERDICT

(Filed Jul 18, 1994)

We, the jury find the defendant, KARL VINCENT FORT, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON
/s/ Illegible
/s/ James H. Button
/s/ Joyce I. Temple
/s/ Illegible
/s/ Gerald S. Hollis
/s/ Marlene Graham
/s/ J.E. Illegible
/s/ Christopher A. Jones
/s/ Illegible
/s/ April Illegible
/s/ Charles K. Humphrey

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA)
)
v.) No. 93 CR 20024
) Judge Philip G. Reinhard
REYNOLDS WINTERSMITH)

VERDICT

(Filed Jul 18, 1994)

We, the jury find the defendant, REYNOLDS WINTERSMITH, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON
/s/ Illegible
/s/ James H. Button
/s/ Joyce I. Temple
/s/ Illegible
/s/ Gerald S. Hollis
/s/ Marlene Graham
/s/ J.E. Illegible
/s/ Christopher A. Jones
/s/ Charles K. Humphrey
/s/ Illegible
/s/ April Illegible

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

(Caption Omitted In Printing)

No. 93 CR 20024
Judge Philip G. Reinhard

VERDICT

(Filed July 18, 1994)

We, the jury find the defendant, REYNOLDS WINTERSMITH, GUILTY of the drug possession with intent to distribute charge contained in Count Four of the indictment.

/s/ Thomas J. Todd
FOREPERSON
/s/ Illegible
/s/ James H. Butlor
/s/ Joyce I. Temple
/s/ Illegible
/s/ Gerald S. Hollis
/s/ Marlene Graham
/s/ J.E. Illegible
/s/ Christopher A. Jones
/s/ Charles K. Humphrey
/s/ Illegible
/s/ April Illegible

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 93 CR 20024
	)	Judge Philip G. Reinhard
v.	)	
	)	
HORACE JOINER	)	

VERDICT

(Filed Jul 18, 1994)

We, the jury find the defendant, HORACE JOINER, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles K. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 93 CR 20024
	)	Judge Philip G. Reinhard
v.	)	
	)	
JOSEPH TIDWELL	)	

VERDICT

(Filed Jul 18, 1994)

We, the jury find the defendant, JOSEPH TIDWELL, GUILTY of the drug conspiracy charge contained in Count One of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles K. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

(Caption Omitted In Printing)

No. 93 CR 20024
Judge Philip G. Reinhard

VERDICT

(Filed Jul 18, 1994)

We, the jury find the defendant, JOSEPH TIDWELL, GUILTY of the drug possession with intent to distribute charge contained in Count Five of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles K. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

(Caption Omitted In Printing)

No. 93 CR 20024
Judge Philip G. Reinhard

VERDICT

(Filed Jul 18, 1994)

We, the jury find the defendant, JOSEPH TIDWELL, GUILTY of using or carrying a firearm during and in relation to the drug conspiracy charge contained in Count One or the drug possession with intent to distribute charge contained in Count Five, as charged in Count Six of the indictment.

/s/ Thomas J. Todd
FOREPERSON

/s/ Illegible

/s/ James H. Button

/s/ Joyce I. Temple

/s/ Illegible

/s/ Gerald S. Hollis

/s/ Marlene Graham

/s/ J.E. Illegible

/s/ Christopher A. Jones

/s/ Charles R. Humphrey

/s/ Illegible

/s/ April Illegible

DATE: 18 July 1994

UNITED STATES DISTRICT COURT
NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

VINCENT EDWARDS

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number:
93 CR 20024-19

(Filed Dec 9 1994)

John Reddington
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One and Four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 846	Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base	07/28/93	One
21 USC § 841(a)(1)	Possess With Intent to Distribute Cocaine Base	04/22/93	Four

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) One and Four, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 353-60-6705

Defendant's Date of Birth: 07/17/71

Defendant's Mailing Address:
Metropolitan Correctional Center
71 West Van Buren Street
Chicago, IL 60605

Defendant's Residence Address:
Same

Tuesday, November 22, 1994
Date of Imposition of Sentence

/s/ Illegible
Signature of Judicial Officer

Philip G. Reinhard, Judge
Name & Title of Judicial Officer

November 23, 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of One Hundred Twenty (120) Months on Counts One and Four to run concurrently.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends defendant be incarcerated in an institution in Memphis, Tennessee that does not have any cooperating defendants in this case and that meets the security concerns of the Bureau of Prisons. The defendant should be enrolled in a comprehensive drug abuse treatment program.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) Years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant is to receive drug aftercare treatment at the discretion of the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 1,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending November 22, 1999.

[ ] ineligible for the following federal benefits for a period of ____ ending ____:

*(specify benefits)*_____
_____
_____

OR

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ____ ending ____.

[ ] be ineligible for the following federal benefits for a period of ____ ending ____:

*(specify benefits)*_____
_____
_____

[ ] successfully complete a drug testing and treatment program.

[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.

THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached transcript for Rule 32 fundings.

Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: III

Imprisonment Range: 97 to 121 months

Supervised Release Range: ___ to 5 years

Fine Range: $ 12,500 to $ 4 million

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Defendant's involvement in offense (conspiracy) for almost 2ys and possession of weapons warrant high end of range.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 93 CR 20024
Plaintiff,	)	Rockford, Illinois
v.	)	Tuesday, November 22, 1994
VINCENT EDWARDS,	)	2:00 o'clock p.m.
Defendant.	)	

EXCERPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

[2] (The following is an excerpt of proceedings:)

THE COURT: The court has considered the arguments made by the parties, the testimony that I've previously referred to in this trial and at the hearing, and in determining whether I should assess an aggravating role to the defendant under 3B1.1, the court has looked at the commentary and the application notes.

There's no question in my mind that he doesn't qualify under 3B1.1(a). There's no indication that he was a leader of the activity. The leaders were the Mob. The Mob was making the decisions as to how this criminal enterprise would operate.

The next question is was the defendant a manager or a supervisor, something less than the organizer or leader. And the notes say that an upward departure may be warranted, however, in the case of a defendant who did

not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization. He doesn't fall within that category. There's no testimony that he was managing assets or property or the basic activities.

So, getting down to it, I have to determine whether he was a supervisor or manager, and the case law indicates under Note 4 the factors that I should consider are about seven factors, and U.S. v. Young that I cited earlier today in one of the other sentencing hearings says I can apply it, whether it's [3] assessing between subsection (a) and (b) or subsection (c). I think these are the relevant factors. There may be others, but I'm going to list these.

First of all, the exercise of decision-making authority. Did the defendant have that? The answer is clearly no. The decisions here were made jointly by the Mob.

Second, the nature of participation in the commission of the offense. The defendant here was a worker since mid-1991, throughout 1991, and throughout most of '92. At some point he became a runner in late 1992. Then in early 1993 he came back as some sort of a worker, and I think it was he was working off some money or cocaine that he lost or didn't get paid for. A very short period of time was he an actual runner, and therefore – and even as a runner, the testimony only is that he supplied a worker under the direction of the Mob. So, the nature of participation, most of it is as a common, ordinary worker who sold on the streets. For one period of time, he was a runner – that was a short period of time – and those are

factors that I consider. I think, on balance, it doesn't help the government in that respect.

The recruitment of accomplices. There is some general testimony that runners on occasion would approve or actually recruit workers. There's no testimony that this defendant recruited any workers in the short period of time that he was a runner, and the evidence essentially is that everybody – [4] workers and runners – were approved by the Mob. So, even if somebody did recruit a worker, that is, introduce a worker, he introduced the worker to the Mob, and the Mob approved it. So, I don't see any great deal of recruitment that can be attributable to this person. In fact, there's no outright testimony of any.

The next factor that the court looks at is the claimed right to a larger share of the fruits of the crime, and that's kind of a wash because the workers get $50 a pack, the runners get $25 a pack. Again, if he was a worker most of the time, then that puts him at a level that is not a supervisor or manager. If, as a runner, he was paid $25, but could make substantially more money – and there was proof that he did make substantially more money – then that might be a point, but there simply is no testimony as to how much money he made as a runner and how long he worked and whether it was more – how many people he might have had under him. So, that doesn't help the government.

The next is the degree of planning or organizing the offense. This defendant wasn't a planner or an organizer. The Mob was. So, that's against the government.

Nature and scope of the illegal activity. His scope most of the time was selling on the streets.

Finally, the degree of control and authority exercised over others, and I think this is very important. There's [5] simply no testimony that he had any authority over anybody that he was telling other people what to do. In general, there's some testimony that a runner might tell the worker what to do, but there's really not much testimony on that point. Especially, there's no testimony as to what this defendant did.

I equate the defendant as being on the lower rung of the organizational scale, that is, the person out in the street doing the selling, and just because at one very short point in time he's a runner, it doesn't mean that even during that period of time his role was any different, essentially, than the workers, who I think were equal to him. Therefore, I do not find that he's a manager or supervisor under 3B1.1(b), and there will be no enhancement under that.

The next point I'll consider is the possession of a weapon during the commission of the offense, and the government may begin with that.

MR. ZUBA: I take it you're not going to consider a two-level enhancment [sic], either.

THE COURT: The same factors that I just stated balance equally the same way as to subsection (c).

At this time you can address the 2D1.1(b)(1) enhancement about the possession of a weapon. And I note, to shortcut this, that there are a number of times where the

defendant was seen with a gun, and you might elaborate on what the actual trial testimony was.

* * *

[6] THE COURT: Thank you, counsel.

The court will recite what the law is in this area. Under 2D1.1(b)(1), that section does not require the defendant to actually possess the firearm, that is, it may be in a house or an apartment or a car that he has control over.

Secondly, the government is not required to show a connection between the weapon and the offense. All the government is required to show is that the weapon was possessed during the offense, and I'm citing United States v. Cantero. Here I think the government has shown at least that and has shown a connection.

The evidence is that – and I believe Box when he says the defendant was a runner in the summer of 1991 – I'm sorry – was a worker at that time. And at that time he continued to be a worker, and on August 29, 1991, he was stopped, and he did have a handgun that he discarded, the .25 caliber pistol. Did it relate to narcotics? Well, the selling was going on at this time. He was a worker at this time. In addition to that, there's proof that there was selling going on, that he was doing it. He was found in possession the very next day on the 30th with three plastic baggies that tested positive for cocaine and almost $400 found in his pocket. The court believes that that shows that it's connected – even though you don't have to, it is connected to the conspiracy.

[7] The court further finds that he was stopped on July 28th, 1992, and did have a .32 caliber pistol in his front jacket at that time. Again, Box's testimony is that at that time he was a worker for the Mob.

On April 22nd, 1993, he is present in a drug house. The police raid it. Yes, he's in the bathroom at the time the police reach the top level; although, I doubt the proof shows he was going to the bathroom. He was probably trying to flush any narcotics down the toilet. In any event, they take him out of the bathroom and into the living room, and there they found a handgun which was loaded and cocked. As far as I'm concerned, he had access or authority in that particular apartment and that the gun either was his or he could reasonably foresee that that gun was used in furtherance of the conspiracy to traffic in narcotics.

Finally, the other testifying government witness, McGhee, testified that he saw the defendant with a gun, although not very often. All of this, plus since he's been in the organization from its beginning or from the beginning of Box's being involved, and all through the time until the arrest on April 22nd, he certainly knew that there were weapons. And there were numerous shootings that were testified to. He knew that weapons were involved. So, he could reasonably foresee that others would carry weapons and others were in possession of weapons at various times throughout this conspiracy. I have [8] no doubt that he was in possession of a weapon during the course of this conspiracy. Therefore, I'll have a two-level enhancement.

The next issue I want to discuss is – and the final issue, as I understand it – would be the quantities that would be attributable to this defendant. Mr. Zuba.

* * *

THE COURT: I'll begin in just a moment. I want to look at one of the trial transcripts here.

(Brief pause.)

THE COURT: Does the government have Volume III?

MR. ZUBA: I do, Judge.

(Said document was tendered to the court.)

THE COURT: Thank you.

(Brief pause.)

THE COURT: All right. The court is ready to make its factual determination as it relates to the calculation of the amount of drugs that can be attributable to the defendant. I want to say that this is a decision that the Appeals Court looks upon as the judge's responsibility, and we're to make the best calculation on the basis of the evidence before us.

As I view this prosecution and have reviewed most of the trial testimony, it appears to me that the trial testimony focused primarily upon Mob members and that the proofs were appropriately directed to those who were the leaders of this [9] particular criminal organization. As it relates to others, such as Vince Edwards, who is a worker, the court has looked at the testimony, and it is more vague. I attribute it to be because the government's

focus and their witness' focus, Mr. Box's focus, was on the persons who played the leadership roles, and it is in that respect that I find that there is not a lot of direct testimony as to what Vince Edwards did.

It's clear that he was a worker, and it's clear that he was a worker for much of the time from mid-1991 until sometime in the fall of 1992, and then in 1993 he kind of got out of that completely and then got back in for an instance in April of 1993 and then was out again.

Again, in making these determinations, the court is also concerned that because of the great disparity in sentencing between crack cocaine and cocaine, it is important to know more specifically what should be attributed to a particular defendant and, in this case, the Defendant Edwards. And so, I am very cautious when I'm looking at a sentence that is a hundred times more serious, depending upon whether it's crack cocaine or cocaine.

The court has combed the record in this case and will make these findings. I'm looking at the transcript right now of Box's testimony, and it appears to me that the first time he mentions the defendant being involved is actually in June of 1991, and at that time Box was still himself a worker, and he [10] testifies that he and Joe Tidwell and Vince Edwards were the three workers, each one having a shift. And it's stated here that Vince Edwards had the 7:00 to 3:00 shift; although, I do recall reading in the government's version that Vince Edwards had the midnight shift. But at least Box testifies on Page 35 that Edwards had the 7:00 to 3:00 shift at 411 Independence.

So, do I credit Box? Well, I credit Box, as I have throughout the trial, as telling me about the organization and telling me about who's in the organization and basically who did what. But when it gets down to the amounts that I'm going to attribute to a particular defendant, I want to make sure that there's the exact testimony that I could reasonably infer what amount of drugs should be attributed to that defendant.

This defendant was a worker, under Box's testimony, for the month of June at 411 South Independence, and they sold about – each on a shift – about four packs – I'm sorry – they sold about six ounces per week, and that six ounces would be about 24 packs. That can be reasonably inferred from what Box says, and that would total 24 ounces for the month of June, and that's 672 grams of powder cocaine.

Is there any corroboration of that? The only corroboration I do have is that there was a raid on June 4th. I think it was the 4th. It might have been the 14th, but I think it was the 4th. And at that time Edwards was inside the residence, and there were some baggies found there with cocaine [11] residue, and the defendant was arrested in those premises. Whether he was arrested for that offense isn't material. It simply corroborates the fact that he was at a drug house at that time.

The second location that Edwards was at was at West and Cunningham, and that took place in, basically, July, according to Box's testimony, and Box essentially says, "Well, we sold about the same amount as the last month," and that's typical of the general characterization of his testimony. He's not saying that he actually saw this

defendant work six days a week. We don't know if the defendant was ever sick or went on vacation or went with somebody somewhere, but he attributes the same amount, which would be another 672 grams being sold of powder during the month of July.

In the month of August, they moved to Cunningham, and the same three persons were working the same shifts, six days a week, and they sold about the same amount as they had sold the previous month. The court would note that this is somewhat corroborated by the fact that the defendant was arrested on the 30th of August, and at that time they found some money on him and three plastic baggies with powder residue. So, that evidence does support the fact that during those three months, at least, they sold, according to Box, about 672 – or this defendant on his shift sold about 672 grams, and that would be a total of about 2,016 grams.

[12] The court in the past has said, well – as it related to other cases – that because there really is little corroboration of that, and we don't know much more than he said, well, he worked for a month, we don't know much more. I have discounted it 10 percent, I have discounted it down to 10 percent, and I'm doing the same thing here. I could reach a different figure of slightly higher or slightly lower, but the court will reach that same 10 percent figure and arrive at 201 grams of cocaine that are attributable to this defendant.

There is testimony further that Edwards was a worker, continued on as a worker through 1991, and also was a worker into 1992 in the spring and summer, but there's no evidence as to what he actually did, how often

he worked, where he worked, other than the isolated testimony in June of 1992 at one time on one shift Box experienced one of the larger sales, which was 54 packs, 500 packs, at that time But he doesn't even know if the defendant worked the entire shift, and the evidence is unclear as to whether it was cocaine or crack.

This typifies the problem or dilemma that the court has; that I believe that the defendant worked during parts of that time, but I have no way to calculate it. It would be an absolute guess to say it was 1 percent, 10 percent, 50 percent, and I'm not going to speculate, particularly where it relates to crack cocaine. And the court could very well sentence this person to life imprisonment if I attribute it all to crack [13] cocaine. That simply is – it has to be shown to me, and it is not.

The only other evidence is that in October of 1992 the defendant became a runner for a couple of months, but, again, there's not a lot of testimony about that, other than it is corroborated by McGhee that the defendant attended runner meetings in late 1992 and that the defendant kept packs in the back of a yellow house in a green Nova. But it doesn't say how many packs the defendant was running or whether it was crack or whether it was cocaine, again showing this court that I'd be purely guessing as to amounts that I could attribute to him.

Finally, on April 22nd, 1993, the defendant, having been – apparently, no longer being a runner, and there's evidence that he was suspended from activities for awhile – he was working at some point on April 22nd, and he's found and convicted of having 5.32 grams of

cocaine base, that being cocaine base found in the apartment that he and several others were arrested at. I believe the other one was – was it Reynolds Wintersmith who was the other person who was arrested and charged and convicted in Count 4?

MR. ZUBA: That's correct.

THE COURT: And there there's 5.32 grams of cocaine base. So, I am considering that because that's what he's been convicted of.

But the court simply has no other corroborating [14] evidence or no evidence period to say during such and such a period of time we can attribute so much to this defendant. The government has presented me with its version of how to calculate it, but it's pure speculation or guess, and I simply cannot do that.

I do believe he was a worker during all that period of time, but it has not been shown to me by a preponderance of the evidence or by any evidence as to how I could calculate this. And I realize that there are different methods of calculation. You just don't have to find it on him. But if there were another method that I could use, I would, as I have in other cases, but here there simply is no direct evidence that I can find, after reading the record, that would give me an intelligent basis to calculate amounts attributable to him either directly or that he reasonably could foresee.

Based upon that, the court will find that there's ample evidence of 201 grams of powder cocaine and 5.32 grams of cocaine base. That would put the defendant in a level 26, and he's already had – I found that he has a two-

level enhancement after that, which would be 28, for possession of a weapon. Therefore, using those calculations, the court has a Sentencing Guideline range of 97 to 121 months, and those are the findings of the court.

If there are no questions about that, we will proceed on with the sentencing as to where I ought to sentence him [15] within that range. Mr. Zuba, any questions?

MR. ZUBA: No, your Honor.

THE COURT: All right. Mr. Redington?

MR. REDINGTON: No, sir.

(Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

_____
Mary T. Lindbloom

I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

UNITED STATES DISTRICT COURT
NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA V. KARL FORT (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987) Case Number: 93 CR 20024-1 (Filed Dec 9 1994) Michael Phillips Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 846	Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base	07/28/93	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) One, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 359-58-4686	Monday, November 21, 1994
	Date of Imposition of Sentence
Defendant's Date of Birth: 05-30-68	
	/s/ Philip G. Reinhard
Defendant's Mailing Address: Metropolitan Correctional Center	Signature of Judicial Officer
71 West Van Buren Street	Philip G. Reinhard, Judge
Chicago, IL 60605	Name & Title of Judicial Officer
Defendant's Residence Address: Same	November 21, 1994
	Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life Imprisonment.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends defendant be enrolled in a comprehensive drug and alcohol abuse treatment program.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years should the laws change and defendant is ever released from imprisonment.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 2,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending November 21, 1999.

[ ] ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

_____

_____

OR

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ___ ending ___.

[ ] be ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

_____

_____

[ ] successfully complete a drug testing and treatment program.

[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.

THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached transcript for Rule 32 findings.

Guideline Range Determined by the Court:

Total Offense Level: 44

Criminal History Category: V

Imprisonment Range: ___ to Life ~~months~~

Supervised Release Range: ___ to 5 years

Fine Range: $ 25,000 to $ 4,000,000.

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Life Imprisonment only available sentence under guideline manual.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 93 CR 20024
Plaintiff,	)	Rockford, Illinois
v.	)	Monday, November 21, 1994
KARL VINCENT FORT,	)	9:00 o'clock a.m.
Defendant.	)	

EXCERPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

[2] (The following is an excerpt of proceedings:)

THE COURT: All right. The first – before we get into the actual hearing, there are some matters that ought to by – that are of a legal nature that ought to be ruled on.

You have filed a motion for issuance of tentative findings, and that motion has been made in previous cases. Do you wish to argue that, or do you stand on your brief?

MR. PHILLIPS: I don't believe I filed a memorandum.

THE COURT: Well, your two-page motion.

MR. PHILLIPS: Well, my two-page motion sets forth the law adequately, Judge, and I just ask to be granted that we have an opportunity after you cite what you find the amount of seizures to be that I have an opportunity to make comments or evidence.

THE COURT: I will do so. The court, in the way I conduct the sentencing hearing, I believe comports with the requirements under the Sentencing Guideline Manual. I'll cite to you also United States v. Pless, which I think approves of the type of proceeding that the court conducts, as well as United States v. Osborn.

And, essentially, the court gives both sides an opportunity to present any evidence as it relates to the calculations as it relates to the amount of controlled substances, and then I have a hearing on that. I consider the trial testimony and then the testimony that we heard today, as [3] well as the excerpts from the first trial. Based upon that, I make calculations and will allow counsel a chance to address those calculations, as well.

So, I am denying the motion that has been filed as it relates to that point.

I'm looking for my copy of the objections to the presentence report. I don't seem to have those. Let me just go through my list here.

(Brief pause.)

THE COURT: All right. I have found my copy of the Defendant Fort's objections to the presentence investigation report. I'm going to take up those matters which I think relate to legal matters or factual matters that don't pertain as yet to the actual calculations.

Number one, the defendant objects to the inclusion in the presentence report of arrests which did not result in convictions of the defendant. The court will make this finding, that I will not be considering any mere arrest without a conviction as evidence against the defendant,

unless any of those arrests were the subject of testimony during the second trial, and I don't know that any were, but to the extent that there may be testimony as it relates to this defendant during the second trial – it may relate to possession of a weapon or something like that – I will consider it, but I'm not considering anything that's in the presentence report standing [4] by itself as it relates to any arrests that have not resulted in convictions.

Do I make myself clear, Mr. Zuba?

MR. ZUBA: Yes, sir.

THE COURT: And Mr. Phillips?

MR. PHILLIPS: Yes, your Honor.

THE COURT: So, I'm granting that as indicated. The second objection is that the defendant objects to the factual conclusion that would show that the defendant resided at 1308 West State Street. That is stated as the address of the defendant, I take it, at some point, or is it just the trial testimony that you're objecting to?

MR. PHILLIPS: I'm objecting to the trial testimony, Judge. At the times pertinent to the trial, he did not live at that address, and we objected all through trial as to that conclusion.

THE COURT: All right. That is a matter of credibility and weight. I will address that as it relates to at the time of sentencing, but I'm denying it. It meets the sufficient foundational basis for me to proceed as to that issue. Whether I give it any weight or not will be a matter I decide. So, I'm denying your objection as to paragraph two.

Paragraph three relates to his possession of a weapon that was apparently found in the execution of a search warrant for 1308 West State Street. That matter will be a contested [5] sentencing issue as it relates to firearms and the possession of a firearm during the commission of the offense for which he was convicted. So, I will reserve my ruling on that.

As to number four – and that's paragraph four in the motion – that also is a contested issue as to whether Mr. Fort was responsible for possession by other persons within the conspiracy, and I'll comment on that at the sentencing hearing.

Number five is an objection to the PSI calculation of a leadership role for the defendant, and that will be a contested issue that I will address at the sentencing hearing.

Number six deals with the amounts of drugs that are attributed to the defendant in the PSI. That is a contested issue that I will decide at the sentencing hearing.

Number seven is a legal objection based upon United States v. Clary, a district court judge's decision – which, by the way, has been overruled – that there's a disproportionate penalty for crack cocaine, as contrasted with powder cocaine, and that that would violate equal protection. Not only has the case that's relied upon by the defendant been overruled, but Seventh Circuit law is to the contrary of the defendant's position.

I'll cite United States v. Chandler is a decision by the Seventh Circuit. United States v. Lawrence is another case

of the Seventh Circuit, which have both rejected the argument that has been set forth by the defendant. So, I will, based [6] upon that case law, deny the objection in paragraph seven.

Paragraph eight relates to, again, the base offense level, and it points out that there has been a change in the Sentencing Guidelines, and I would agree that the Guidelines, as of November 1st, 1994, have been changed to have different classifications than the Sentencing Guideline manual in effect prior to that time. I'm not agreeing of the amount that – making a decision as to the amount of cocaine or cocaine base possessed by the defendant, but I am agreeing that the manual has been changed, and the highest he could be found to be in would be a level 38. Does the government agree with that?

MR. ZUBA: We agree that for drug quantity, the highest is 38.

THE COURT: All right. The defendant has also objected, finally, in paragraph nine to the assignment of a criminal history level of five based upon four misdemeanor convictions, and the defendant states he believes that he was convicted of only one of the four offenses, and the other three charges were then dismissed.

The court will – you said you were checking on that, Mr. Phillips. My information is what's in the presentence report, and at this time I believe it's correctly calculated, unless other charges were, in fact, dismissed. Do you have any evidence to the contrary?

MR. PHILLIPS: No, your Honor. I haven't discussed it [7] with the probation department. She showed

me certain other documents, but I have not had independent confirmation at this time.

THE COURT: All right.

MR. PHILLIPS: I have nothing to say that she's wrong, but I have not been able to independently confirm that.

THE COURT: All right. I will accept, there being no evidence to the contrary, the four misdemeanor convictions and that they resulted from separate criminal offenses on separate occasions, and, therefore, the criminal history category would be at five.

* * *

THE COURT: All right. Thank you, counsel.

The court is ready to make its findings. And, first of all, I want to indicate what I believe the scope of the conspiracy alleged is. The scope of the conspiracy is that a group formed to distribute cocaine and crack cocaine from sometime in 1991 through July 28th, 1993, and that the method used was that there was a core group, sometimes called the Mob, and that core group made the policies, contributed the money to buy purchases, and distributed the profits, and that decisions were made by this group, and they would then approve various persons who would be runners and would be workers. The court is convinced from the evidence that I've heard that there is no one leader, but, in fact, as I found in other cases, the [8] leaders were a group of people who formed for the purpose that I've just indicated.

So, in answer to Mr. Phillips' comment that for a period of time the defendant was not a member of the

core group, I think the evidence supports that for – I thought it was just a month or two, and I think it was near September or October of 1992 – but he came back into the group and in the same role that he was in before. So, I will have to determine whether he, under the facts, is a member of that group. If he is a member of that group, which I call the Mob or the core group, then I have to determine if they were all leaders.

I have preliminarily stated that they all acted together decided matters as it relates to the sale and distribution of cocaine and crack cocaine, that they all had an equal voice, they held periodic meetings for this, they split the profits, and in that way all appeared to be responsible if they were a member of the core group.

The court does find that during the period of time of early 1991 and continuing on through July 28th, 1993, that he was a core member, except for the brief period of time he was out. But he got back in, resumed the same role. And the court would further find that if one becomes a leader, he could reasonably foresee acts of the other coconspirators who were members of the core group and could reasonably foresee that runners and workers would be employed to carry out the [9] distribution of cocaine and crack cocaine and specifically that a leader could reasonably foresee conduct of the coconspirators' focus here and the scope of the defendant's agreement with the coconspirators under United States v. Edwards.

Here the evidence is overwhelming that defendant actually knew and could reasonably foresee the conduct of all the coconspirators in carrying out the plan to distribute cocaine and crack cocaine, and the court draws

these conclusions as to his leadership role from the following evidence.

First of all, Donald Box's testimony. Donald Box is, as of the fall of 1991, a core member, and Box remained a core member until July 28th of 1993. This is direct testimony of the organization, the contribution to become a core member, the splits of core members, how decisions were made by core members, by a majority vote, and the method of distribution of cocaine and crack cocaine through runners and workers. And the recruiting of the runners and workers, and the methods used to obtain cocaine, the methods used to protect their cocaine are all part of leadership decisions.

Box places defendant as a member for the period of time – as a core member for the periods of times that I've stated. And as far as the court is concerned, from listening to the testimony in trial two, it appears to me that clearly [10] Defendant Sam Tidwell and Helen Fort were major parts – major leaders, had more authority, as well as Don Box. But just the fact that somebody had more of an active role, they all – all those who joined the core group described by Box voted and participated as leaders.

And the court would also say that were Box's testimony there alone, I might be suspect because his credibility was impeached on several matters at trial, and he has an inducement to provide evidence that might be incriminating against other persons because of his plea agreement with the government. And so, I have looked at his testimony and would hesitate somewhat – I'm not saying I would discredit it, but I would say that were it

unsupported, the court would have a much closer question, but I do find his testimony in most respects, and particularly as it relates to the leadership role of the defendant, that it is credible and it is corroborated.

It's corroborated by Reginald Purvis' testimony. Purvis states that when he was working for Bingo Craig, both selling and later as a runner in 1992 and distributing cocaine, that he was told by Craig in 1992 that Craig had become a member of the Mob, and Craig told him who those members were and that the defendant was one of the core members.

This evidence is also corroborated by Purvis' own testimony that he went to meetings on Oakley and saw defendant and other Mob members there, and also he and Craig began [11] getting cocaine to sell from various members of the Mob at 1308 West State Street, from defendant once or twice and from others. And in January 1992 defendant gave him an ounce and a scale and told him to bag it up. Therefore, the court is convinced that the defendant was one of those that was a core member, not just through Box's testimony, but as corroborated by Purvis, and Purvis' testimony is corroborated by other evidence.

Also, the court recalls testimony that in the summer and fall of 1992, Purvis continued to pick up cocaine from members of the Mob, including the defendant, and that after Purvis' January 28th, 1993, arrest, the Mob talked with him, and the defendant was present, and they talked about his work and the money owed to the group and why he wasn't hanging around, and about that time he

was then discharged from any work with the organization.

In addition to the corroborating evidence by Purvis, Decarles McGhee provided credible evidence to this court. He stated that he started working as a runner in late 1992 and had to meet with those who gave him permission to work. He was introduced, I believe, to the group through a person by the name of Jones, and he could not be approved until the group approved it, the core group, and the defendant was there when Decarles McGhee was allowed to be a runner and approved to be a runner.

[12] In fact, I think the evidence, as I recall it, is that at that time when he was approved, the defendant told him that he would be a runner; that McGhee didn't know exactly what capacity he would be hired as, and the defendant told him he would be a runner. Later the defendant told him what to do on the job. He checked on him, meaning on McGhee, and when McGhee attended runner meetings, they got their instructions from the core group, and the defendant was present at some of these meetings. He was told to get a pager by the defendant so that he could keep in touch with the core members; although, McGhee never got a pager. McGhee's testimony is corroborated in some respects by the videotape – I think that's Exhibit 442 – and that shows how he got the drugs.

In addition to the corroborating of Box through McGhee and Purvis, the intercept tapes that were referred to by the government in its opening this morning clearly show the defendant giving orders and directions and

having knowledge of the overall operations of the conspiracy during the time of the intercepts in the spring of 1993. Specifically, but not excluding any others, I include tape numbers 1, 24, 35-2, and 81 referred to by the government.

Also, there is one minor bit of corroborating evidence that the Mob members took a trip to Jamaica in October of 1992, and the fact was that those persons who were alleged to be members of the core group are, in fact, all pictured and all [13] took that particular trip.

The court, examining the trial testimony, certainly believes he's a member of the core group; and, as I've previously said, the core group made all the decisions in this case. And I look at those factors that are listed under 3B1.1, Application Note 4, to distinguish a leadership and organization role from one of a manager or supervisor. There are factors that I consider, and there are seven factors. I've considered each one of those factors. And each one, the defendant fits into the category of being a leader, along with the other core members.

The next question is whether as a leader, the activity involved five or more participants. Under the case law he himself is considered one of the five, and he must have direct supervision or control or have brought in four other persons. The court will make these findings, that he was instrumental when Box joined the group as a worker at one point in time, and there's evidence that Joe Tidwell in mid-1991 and Vincent Edwards in 1991 and throughout were all directed by the defendant or other members.

So, that makes three persons, and including himself is four, and McGhee was approved by the defendant, and

that would make five, and also Purvis eventually was working and received instructions from the defendant. So, those are five or more participants.

[14] In addition, the court believes the law to be such that the five or more participants also could be members that the defendant – or people that the defendant reasonably could foresee would be brought in in some capacity as a runner or worker as directed by the group, whether to be brought in by him or someone else, and he would be responsible for bringing all those other persons in by virtue of the fact that he was a leader of the core group.

In addition, the court will find that the criminal activity was otherwise extensive, and you do look at the number of participants in the offense, whether he has control over them or some direction over those persons. And, as I've said before, he had direct control over Box for a period of time and McGhee for a period of time, as well as Tidwell, Edwards, and himself.

But I will also find that the organization had many other persons that were working at one time or another. Lockett, Joiner, Hammond, Tonka, Warren Keyes, Donnell Webb, Willie Tidwell, Willie Johnson, all those people and a lot of other persons that are named in the transcripts that I referred to and unnamed persons. This was certainly an extensive organization, and the core group controlled those persons.

So, I will find, based upon all that I have just said, that he is a leader under 3B1.1(a) and will have a four-level enhancement on the basis of that.

* * *

[15] THE COURT: Thank you, counsel.

Both lawyers have pointed out their respective positions, and I think both accurately, as to the strengths or weaknesses of the calculation by the probation officer. I have also looked at the trial transcript testimony from trial two and make the following findings.

First of all, McGhee testified that he saw defendant with a gun during the time of the conspiracy. Second, Box testified that he saw defendant with guns during the conspiracy. Third, Box said that he saw four AK-47s early in 1993 at the address on Henrietta, and defendant was there. Fourth, that at the time of the raid at 1308 West State Street on April 14, 1993, there was an AK-47 recovered and a Mack 10 machine handgun from the second floor.

There were also two nine millimeter handguns, two shotguns, and ammo from the basement. And the court has evidence that the defendant, by virtue of his identification being found in one of the apartments there and much testimony about meetings there and that Karl Fort had lived there for a period of time, that evidence leads me to conclude that he used or controlled the entire premises, except for the apartment on the first floor, at or around April 14, 1993, at the time of the seizure.

All this is – defendant's participation in guns, that [16] he individually may have possessed, is corroborated by the intercept tapes. Granted, some of them he's talking about getting a gun, but there's enough in my rereading of the intercept transcripts that he certainly – during the

course of April through July of 1993, certainly knew that guns – certainly possessed a gun on his own.

Finally, the defendant, as a leader and part of the core group, could reasonably foresee, based upon all the evidence in the trial, that other persons in the Mob would control weapons. They talked about protection of their profits, protection of their cocaine, and it's clear that at the time of Box's arrest on July 28th, 1993, and Tidwell's arrest on that same date, that a great number of weapons were found in their homes, and the defendant could reasonably foresee it. And, secondly, that those weapons, the court finds, were in furtherance of the conspiracy; that is, to protect the property of cocaine, crack cocaine, and money.

Therefore, based upon not only my finding that at various times during the course of the conspiracy the defendant himself possessed the weapons that I've indicated, he also is accountable for the weapons that were seized on July 28th, 1993, and there is hard evidence of that.

The court, therefore, will assess, in accordance with what the probation officer has found, as well, a two-level enhancement for possession of a weapon during the course of the [17] conspiracy offense.

Finally, the court will now address the base offense level, which will look at the quantities that may be attributable to the defendant. You may proceed first, Mr. Zuba.

* * *

THE COURT: Thank you, Mr. Phillips.

The court will first say that in making these calculations on the base offense level, as well as making all the Sentencing Guideline calculations, I've considered the new United States Sentencing Commission Guideline Manual, which is effective November 1st, 1994. I don't know that it would make any difference, except as it relates to the drug quantity table; and then when I say it would make a difference, the offense level there in the present manual cuts it off at a level 38, whereas I believe the Sentencing Guideline Manual in effect prior to that point goes up to a level 42, that is, it makes it higher based upon higher amounts of, in this instance, cocaine base. But, as I say, it probably works to the defendant's advantage that he can only go to a 38 under the new Sentencing Guideline Manual, whereas he could have gone to a 42 under the drug quantity provisions of the prior manual. So, I'm taking into consideration the new manual.

Secondly, I want to indicate that I have, in preparation for this and the other sentencing hearings of [18] persons in trial two, reread in its entirety Mr. Box's testimony, Mr. Purvis' testimony, Mr. McGhee's testimony, I've read the intercepts, and also the body recording testimony of Melvin Jones. I've also reviewed my trial notes, which include all the notes on the testimony of all the witnesses. And based on a review of that and based upon the comments by the lawyers in addressing me just now, I'll make the following finding as it relates to the base offense level.

I want to make it clear that in certain instances Box's testimony is not corroborated, and I have diminished amounts attributable that he attributes based upon lack of

corroboration. I want to again reiterate I believe Box's testimony as to the organization, the scope of the agreements, the persons involved, the distribution scheme, and all the other matters as it relates to the splits and who was involved and in what way. However, when it relates to the actual amounts that are attributable, his testimony is more general, more estimating, and because of that I have been conservative in my estimates, taking care that it is accurate to the best of my ability. And it is the court's duty, and I recognize that, to determine the responsibility for the quantities of cocaine and crack cocaine, and I must, to the best of my ability, make calculations so that the reviewing court can look at that as a factual matter.

The court will make these findings as follows. From [19] the April 1991 period through August 1991, the court finds that Box was a worker at that time and that he testified that the defendant was one of the leaders and supplied him with cocaine. Box testified that he sold about five packs of dime bags a shift. He estimated that that was about 24 packs a week in his shift and that there was three shifts going on.

If that is accurate – and that is his testimony – that would total approximately – 24 packs equals six ounces, and if I take it that there are three shifts, which he testified to, that would be 18 ounces a week, that that period of time from April 1991 through August 1991 is 20 weeks. There would be a total of 360 ounces of cocaine sold during that period of time. That totals ten kilos of cocaine.

It was sold from an address on Mulberry, an address at 414 South Independence, an address at West and

Cunningham, and at another address. I'm not sure if it was on Horsman or where it is, but it was in the evidence. And the only corroboration of that is that there was a raid on – I believe it is either June 14th or June 4th on South Independence, and the defendant was there outside, and Vince Edwards and some others were arrested inside, and some small quantities of cocaine were discovered.

But that's about the only corroboration, and because of Box's estimates, the court is being very conservative and will find that only 10 percent of his testimony is accurate; [20] and, therefore, I will, for the purposes of determining the quantities, determine that there was one kilo of cocaine that can be attributed to the defendant through his leadership role in the organization, and that's what I'm basing not only this calculation, as far as this amount, but all the other amounts that I find are because of the defendant's – I've already found that he is a leader, and I further find that because he's a leader of this core group, he had knowledge, he reasonably could foresee all the purchases and the sales, and that he could – and that these were all in furtherance of the conspiracy and within the scope of that conspiracy.

The alternative to the court in finding 10 percent of the amount, as I've attributed for April through August of 1991, would be simply to say, well, I attribute all, or I attribute none, and the court has done its best judgment in saying, well, there's some corroboration, although very little. I also believe what Box has said, but I'm being very conservative in estimating it at 10 percent. Therefore, one kilo will be attributable to the defendant in this respect.

From September through January 1992, Box's testimony is that Helen Fort purchased cocaine at two or three kilos per month. If I took the low figure of two kilos a month, that would add up to eight kilos of cocaine. The court, for the purposes of calculating the amounts, again, is really relying on Box's testimony. There is some corroboration by Purvis, who [21] does testify that during the fall, late fall of 1991, and early January 1992, he was selling and running. And so, that corroborates to some extent the nature of the organization and the nature of the sales. That's about the only testimony that there is.

There is testimony that is corroborated that Box was stopped in Arkansas in March, and although that falls a month or two outside that time frame, he was stopped with $4,000 cash, and I think Russell and one of the Tidwells were stopped also about that period of time with $1400 in cash; and, as far as I'm concerned, that corroborates that near that period of time these people were dealing in fairly large quantities.

There's also some testimony by Walker of his sales during that period of time. This was another witness that just testified in this trial. I forgot his first name.

MR. ZUBA: Terrence.

THE COURT: Terrence Walker. And he does corroborate that.

On the basis of that, again, the court feels that an all or nothing approach would not be the appropriate approach. I can estimate, because of some corroboration, that four kilos of the eight kilos that Box estimates, I will

calculate as being attributable to the group, and, as such, the defendant reasonably could foresee it.

As to the purchase – the next period of time is [22] basically in the spring and summer of 1992, and these focus around the purchases from Sherman Ollison. The court has heard evidence that there was a – locally, at least, there was a lack of supply, that it had dried up in about that period of time. So, they attempted to get supplies from a different supplier.

The testimony by Box is that Sam Tidwell purchased one kilo from Ollison in the spring of 1992, that Box and Willie Tidwell purchased three kilos – and, again, this is money coming from the group – and that this occurred sometime after Mother's Day of 1992. That another purchase was made from Ollison by Willie Tidwell and Reynolds Wintersmith, and that was three kilos, and that was a couple weeks later. And that, finally, two weeks after that, Willie Tidwell and Willie Johnson, with Mob money, went to purchase three kilos, did purchase three kilos from Ollison, and they were stopped, and the three kilos were seized. This was corroborated by the testimony of officers from – I believe it was Scott City, Missouri, who testified as to that seizure.

In addition, there's one kilo that – or Ollison was himself stopped in Chicago. There was testimony that three kilos were taken from a suitcase that he had, and the government stipulates that one of those kilos was bound for the group here in Rockford, and that's confirmed by Box's testimony that that shipment from

Ollison was designed to make its way to [23] the Rockford group. That's a total of eleven kilos that are attributable to be from Sherman Ollison. That's what Box says.

What evidence is there to corroborate that? Well, first of all, there is the testimony of the seizure in Chicago of the three kilos. So, that corroborates that particular shipment. The court further finds that there was a seizure of three kilos from Willie Tidwell and Willie Johnson, and that corroborates that. Therefore, the court believes that all of the supplies coming from Ollison that were testified to by Box can be verified. Because of the other seizures, I tend more to believe Box that the eleven kilos comes from Sherman Ollison, as testified to.

In addition, there's testimony about large amounts of Mob money being collected to pay the bonds for Willie Tidwell and Willie Johnson, and that shows that the Mob was interested in this. Purvis also testifies as to the large amount of cocaine being distributed and crack cocaine during this period of time, and so does McGhee testify as to the large extent of what was going on, and that would verify the fact that they needed a large supply of cocaine.

As to how I'm going to attribute that, Box's testimony is that the majority of it was for crack cocaine. The court has previously found in the other sentencing hearings that I heard on the first trial that I believe that about half would be attributable to cocaine and half to crack cocaine. The [24] court would note that today Box testified two-thirds is what he means by a majority. I think that's subject to speculation, and, therefore, the court attributes 50 percent to crack cocaine and 50 percent to

cocaine, which means five and a half kilos of cocaine and five and a half kilos of crack cocaine.

Now, obviously, up to this point, there's a sufficient amount that meets the 1.5 kilos in the Guidelines Manual to put the defendant at a 38 level. On the other hand, I must make additional findings because the evidence is before me, but certainly the amount is now there that would place him in a category 38.

The court heard testimony that from the summer of 1992, also in 1993 until the date of the arrests, various amounts were purchased from Ilander Willis. Box testified he purchased two from Willis in the spring of 1992 that was no good. The court will credit that because there was evidence that during that period of time they needed a large amount of cocaine.

In addition, he said that in 1993 he got cocaine in kilo quantities from Willis, and today he testified that that would be about – I believe he said six or seven kilos that he got from Willis. The court will attribute six kilos to the group – from that to the group. I'm not going to attribute any more because it's speculative, it's general. But I do believe that at least six can be corroborated by the following [25] evidence.

First of all, on May 28th of 1993, there's a seizure of almost one kilo of crack cocaine, and that corroborates both that a large amount was being distributed at that time, which would support that a large amount had to be supplied, and, secondly, it also supports the fact that crack cocaine was being made in large quantities, and that residence – it was seized at the residence of Gloria

Holmes, and the evidence shows by Box's testimony that it was stored there by Montie Russell.

Montie Russell was the boyfriend of Ms. Holmes, and Montie Russell, the evidence shows, was a part of the leadership group, and Box had been there and seen Montie Russell take amounts from a quantity that was hidden at that home, and he also was there one time when Russell went up to get some, and he didn't accompany him, but he waited outside in the car. And there's sufficient link to the organization not just by Box's testimony, but there are calls to Gloria Holmes that were intercepted which show Sam Tidwell talking to her and Montie Russell talking to her that links, at least, the seizure on May 28th, that this group was concerned about that.

The court further finds that the intercepts from the period of April through July 28th, 1993, clearly show the extent of the organization, the activity of sales and distributions. The government has referred to some of this in [26] their closing argument, but the court will simply state that there's ample evidence through those tapes that this organization was distributing on a large basis, and there's further support that quantities were obtained from Ilander Willis based upon those intercepts.

Again, to show corroboration of the amounts that were being sold during the 1993 period that had to be supplied, and the court finds were supplied from Willis, is the testimony of Purvis about the amounts that he was running, the amounts that McGhee testified he was running, and McGhee was also arrested with some money and drugs on him; that drugs were seized in a garage on

July 28th where the Mob met – several Mob members lived, and they operated sales out of that area.

There are tapes, body recorder tapes, of Jones that show defendant's involvement and the quantities that were involved in that situation. There were baggies seized on numerous occasions, numerous raids, throughout the 1993 period, and in one – after the defendants were arrested, Box testified that at one Mob house there was a huge bag containing over 40,000 baggies that were to be used to sell crack cocaine in. This is corroborated by the fact that somebody reported that, and the police did seize that large quantity. And that house was controlled by the Mob, and that was at 1123 West State.

There was a large amount of money and drugs that were found or a large amount of money and some drugs found when Box [27] and Sam Tidwell were arrested on July 28th, which corroborates the extent of this organization. There's some surveillance evidence that shows the extent of the operation. The pagers and cellular telephone evidence shows that this was a sophisticated operation during that 1993 period, all tending to show that this was a large organization. They needed a supply, and it would credit Box's testimony as to the amounts.

The April 14, 1993, search warrant for 1308 West State, they found large amounts of money, and that was in one of the bedrooms. I think there was about $4900 in the southeast bedroom and then 2,000 in a drawer in the southeast bedroom. I found that Box was there, but even – I'm sorry – I found that Karl Fort had control or possession over that premise, but even if he didn't, it's clear that other members of the Mob used that place, and

that large amount of money shows to me that there was a large amount of dealing in cocaine and crack cocaine. The trash evidence also supports the significant quantities being arranged for distribution through the organization.

In short, I've detailed all this evidence, and the court, again during that period of time of the 1993 sales, will attribute 50 percent to crack and 50 percent to powder, all of this getting to quantities significantly over 1.5 kilos.

And the court has been asked to consider the heroin distributions in 1992. The court has been asked to consider [28] other purchases that may have been made by Mob persons from Pierson and Sockwell. There hasn't been the definitive testimony that would establish those. They're unnecessary, anyway, and the court would find that I need not calculate that and do not calculate it. I don't find there's sufficient credible evidence that that has to be included within the calculations to put this person at a 38 level.

The court would also find that his mere absence from the organization for two months doesn't materially affect my calculations. He was there and planning all along, and the court is satisfied that during that period of time that he withdrew, there were no significant purchases that would subtract from the totals that I have calculated.

Therefore, based upon the evidence, based upon my findings – and I'm finding beyond a reasonable doubt that these amounts would be calculated as I've indicated – puts him at a 38 level.

* * *

THE COURT: The government has supplied me with – and you, as well, Mr. Phillips – with a certification of the conviction for misdemeanor offense on June 23rd, 1989, as to the possession of less than 2.5 grams of cannabis, which is reflected in the presentence report, and that was the matter under some contention, and that is at lines 414 through 420.

In addition, the probation officer has secured [29] certified copies of the other convictions that have been relied on by the probation officer to justify the.points that have been allocated for criminal convictions. Both of these shall be a part of this record. You've received a copy from the probation officer, as well?

MR. PHILLIPS: Yes, I have, your Honor. Do you have original signatures on your document, just for the record?

THE COURT: Well, I have an original – you mean by –

MR. PHILLIPS: For the certification.

THE COURT: (Continuing) – the defendant? I not only have the certification, but I also have – they have copies of the docket, which includes a copy of the defendant's signature on a guilty plea. At least I'm looking at the first one. Yes, I do have a certified copy signed by the Clerk of the Circuit Court of Winnebago County.

MR. PHILLIPS: Thank you, your Honor.

THE COURT: These will remain in the file then. Based upon that, there being no other objection, I will find that the defendant is in a criminal history category of five.

We're at the stage on the Sentencing Guideline calculations, I've made my calculations tentatively on the base offense level, that is, as to quantities. Did you wish to state anything more in that regard, counsel?

MR. PHILLIPS: Just briefly, your Honor. With regards to your findings, your Honor, we appreciate your finding of no [30] allocation for the presence of heroin. The only thing we would ask is that there was testimony that Mr. Fort was not a part of the conspiracy in the months of – I think we decided on September and October.

THE COURT: I believe the record shows that he went out sometime in September or October and came back about a month to two months later.

MR. PHILLIPS: And you gave him credit, basically, for one kilogram of cocaine powder, I believe, in each of those months. We would ask that the finding be reduced as to Mr. Fort because he was not actively involved in any way with this alleged group during those months. Therefore, the amount of cocaine attributable to his conduct should be reduced by the amount for those two months.

THE COURT: Did you wish to respond to that?

MR. ZUBA: Just simply by stating that Mr. Phillips is mistaken. There was no reduction for him not being a part during that time period because that was 1992. Your discounting that was done pertained to the fall of 1991 time period. As far as the calculation of cocaine purchased during 1992, it was not reduced at all. We don't think it should be reduced at all. It was based on

purchases. The purchases didn't occur during that two-month period.

Furthermore, the test is whether or not it would be foreseeable to Karl Fort, and just because he isn't a part at [31] that time, he made no legal withdrawal, and there is no reason to believe that any additional purchases would be foreseeable to him. But the bottom line is you didn't compute any purchases during that two-month period.

THE COURT: The court recalls my findings, and the purchases that were attributable from Sherman Ollison were all prior to that period of time, and the purchases from Ilander Willis were prior to that time. The other purchases took place in 1993. So, number one, I didn't attribute any purchases during that period of time.

Secondly, under United States v. Edwards, the court can consider that a person who might drop out from a conspiracy and rejoin – or someone who just might join at a period of time shortly after some transaction occurred – the court can, if it's really foreseeable to a defendant, consider a prior transaction and attribute that to that person.

In my opinion, this defendant was out of the conspiracy only for a short period of time. He got back in knowing what had happened in the past and what he intended to do in the future, which was the same thing that had been done since 1991. Therefore, I would not reduce my calculations by any during the time that he was out of the conspiracy for a month to a month and a half.

With that, are there any other questions as it relates to the Sentencing Guidelines?

[32] MR. PHILLIPS: No, your Honor.

(Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom

UNITED STATES DISTRICT COURT
NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA V. REYNOLDS WINTERSMITH (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987) Case Number: 93 CR 20024-18 (Filed Dec 9 1994) Craig Sahlstrom Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One and Four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 846	Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base	07/28/93	One
21 USC § 841(a)(1)	Possess With Intent to Distribute Cocaine Base	04/22/93	Four

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) One and Four, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 318-64-8784

Defendant's Date of Birth: 07-07-74

Defendant's Mailing Address:
Metropolitan Correctional Center
71 West Van Buren Street
Chicago, IL 60605

Defendant's Residence Address:
Same

Wednesday, November 23, 1994
Date of Imposition of Sentence

/s/ Philip G. Reinhard
Signature of Judicial Officer

Philip G. Reinhard, Judge
Name & Title of Judicial Officer

NOV 23 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life Imprisonment on Count One and Forty (40) Years on Count Four (to run concurrently with Count One).

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years should the laws change and defendant is ever released from imprisonment.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 1,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending November 23, 1999.

[ ] ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

_____

_____

OR

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ___ ending ___.

[ ] be ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

_____

_____

[ ] successfully complete a drug testing and treatment program.

[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.

THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached Rule 32 findings

Guideline Range Determined by the Court:

Total Offense Level: 44

Criminal History Category: I

Imprisonment Range: ___ to Life – Count I 40 yrs – Count IV months

Supervised Release Range: ___ to 5 years

Fine Range: $ 25,000 to $ 6 million

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Life Imprisonment required under guidelines. No reasons for downward departure.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 93 CR 20024
Plaintiff,	)	Rockford, Illinois
v.	)	Wednesday, November 23, 1994
REYNOLDS WINTERSMITH,	)	1:30 o'clock p.m.
Defendant.	)	

EXCERPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

[2] (The following is an excerpt of proceedings:)

THE COURT: Thank you.

The court has carefully considered the testimony at trial and has reread the pertinent transcripts and looked at the case law and listened to the arguments of counsel and will have these remarks in making the factual findings that are necessary.

The evidence that Reynolds Wintersmith was a leader or organizer under 3B1.1(a) is primarily from the testimony of Donald Box, and I have considered that testimony and have considered the fact that in several respects he's been impeached through his grand jury testimony, and also several of the facts don't necessarily correspond to the times that Mr. Box testified to, and I think, thirdly, much of his testimony was in general, but he did testify as to the specific role that each person

played who became a so-called member of the inner group, sometimes called the Mob, and the court has – if I had solely the testimony of Donald Box before me, it would be a very, very close question as to what I would find.

The testimony of Box, I've looked at it and tried to figure out if he had a reason to lie, why would he be putting Reynolds Wintersmith into the inner core. There's other people that he easily could have put into the inner core group, and he's not done so. He's testified that from time to time members left the inner group. And so, at least looking at his [3] testimony, I find that it becomes somewhat credible because I can't figure out why he would put Reynolds Wintersmith in if he wasn't in, but still the court looks at it very, very carefully.

It's Box's testimony that the defendant joined the group, the inner group, in April of 1992, and from that period of time – at which time Wintersmith had to pay some money to get in – and from that period of time, he remained a member of the inner group until they were all arrested on July 28th of 1993, except for a period of time when Reynolds Wintersmith and Karl Fort left the group, after some disagreement, for a month or so around September or October of 1992.

And it is Box's testimony that whenever somebody joined the group that that person had to pay money, and once they paid the money and became a member of the inner group, then that person shared in the profits on an equal basis and voted along with the other people on various matters that came up for a vote as it relates to the conspiracy that's charged.

The corroboration of Box's testimony comes by virtue of another former member of the conspiracy, but not a member of the inner group, and that's Decarles McGhee. He began working for the group in late 1992 as a runner, and he attended several meetings, and the defendant was there. He did testify that the defendant told him he better get a gun and that when bagging was done by the Mob members that he saw, meaning Decarles [4] McGhee saw, defendant was there.

McGhee also testifies that three months before the arrest, defendant and other Mob members subbed as runners for a period of time, which may explain why Reynolds Wintersmith was in the house when he was arrested on April 22nd, 1993. And, finally, on cross-examination the defendant – or he, McGhee, says defendant was a Mob member throughout the time that he, McGhee, was working. I don't know why McGhee would necessarily lie to put Reynolds Wintersmith in there. For example, when asked about Joiner, he said, "I didn't ever see him, didn't ever have any contact with him." What I'm saying is if McGhee was trying to put people within the leadership or try to incriminate other persons, he didn't do it when he had the opportunity.

If the argument could be made that Box and McGhee were lying just to help the government and looked at the indictment and saw who the government was after and then made up their story, they could have given much better testimony against certain of the defendants, and they didn't. They chose not to say that certain defendants were either Mob members or did work for the group.

So, in a sense, McGhee corroborates the testimony of Box. And for very little weight, but some weight, is the fact of the trip to Jamaica, and although it is about the time that the defendant supposedly is out of the inner group, there is a [5] trip that the leaders took, and the defendant was one of those persons.

The court, therefore, believes and will find that the defendant was a member of the inner group, that he became a leader because they all – that group then, once you became a member, they voted by majority vote. They had a contribution they had to make to get in the group. They had to split profits. They regularly attended meetings. They approved runners and workers. And it's clear from my recollection of the testimony that there's no one person in charge, that is, there's no evidence that, say, just Karl Fort was in charge.

I do believe that Karl Fort, Donald Box, Sam Tidwell, and maybe Michael Gillespie were three of the more dominant figures; that is, personality-wise, they seemed to have been more active in the sense of they're on more tape recordings and appear to be more active. But all of these, including the defendant, were making the decisions, and in any group you sometimes find some people who are more vociferous and a stronger personality, but I believe under the evidence the defendant, even though he was 17 years old, joined the group, probably seeing what money they were making and was given that opportunity.

As further support, I have looked at the Guideline test under 3B1.1, and that sets forth certain factors that the court ought to look at, and I look at these factors to

see [6] whether the defendant is an organizer or leader or whether he's a manager or supervisor or whether he's none of those. And first I look towards the exercise of decision-making authority, and under the facts – at least Box testifies, and so does McGhee corroborate this for part of the time – that for slightly over one year, the defendant was making jointly decisions that the core leaders made to determine the operation of the charged conspiracy, and that factor goes against the defendant and would show that he is a leader.

Next I look at the nature of participation in the commission of the offense, and I think he, like others, directed those who were runners and workers, and he was working full time at this illegal activity, except for one or two months. So, while he wasn't an original organizer and he came into the organization at a later date for a year's period of time, he was voting on the decisions. So, I think the nature and participation in the offense was extensive.

The recruitment of accomplices. I could find no direct evidence that he recruited individuals or none that he didn't. All Box said was generally that they, the Mob, recruited runners and workers. So, I don't think that cuts either way. If it cuts any way, it helps the defendant on that factor.

The next factor is the claimed right to a larger share of the fruits of the crime. Well, the core members divided the [7] proceeds equally with the other core members, and this certainly was more than the runners and workers

were paid on a commission basis. So, believing that testimony of Box and McGhee, I find that against the defendant.

Fifth is the degree of participation and planning or organizing the offense. Well, it was organized, as I said, by Box and/or at least initially by Fort and Tidwell. Box then became involved and later the defendant. So, while he wasn't involved in the organization, he later became involved in the planning of all the subsequent events from April 1992 'til his arrest. So, that works against the defendant, and it shows that he may be a leader.

The next is the nature and scope of the illegal activity, and this was a vast organization, and he was at the top. So, it indicates that he was a leader.

Finally, the degree of control and authority exercised over others. Generally, the leaders told everybody else what to do. That's according to Box's testimony. I found very little in the record to support that the defendant was telling anybody what to do, except on one occasion McGhee took orders, and McGhee was one on the lower echelon. So, there is some evidence that he was giving orders, and that tends to show that he's a leader.

The court, based upon those conclusions of fact, would find that he's a leader, and the next decision I must make is [8] whether he supervised others, that is, whether he, as a leader, that it involved five or more participants, and for him to be charged with a four-level enhancement, it must be shown that he supervised not only himself, but four other persons. And all I can find is that he might have on one occasion supervised McGhee.

On the other hand, there is law, I think – although, not completely settled in this circuit – but looking at United States v. Brown at 31 F.3d, the court may consider whether if he is a person who's a leader, does he have – can he reasonably foresee what other persons would do in the recruitment and directing of other persons, and if he knew that other members of the Mob were going to supervise and recruit other members, then he would be responsible if it could be reasonably foreseen and that it was done in furtherance of the conspiracy. And certainly Edwards, Vince Edwards, Dexter Hammond, Joe Tidwell were all recruited, along with McGhee, and that's four persons right there, and the defendant himself makes five. So, if you use that theory, he would be supervising four or more participants.

In addition to that, however, I find that under subsection (a) he can be responsible for an increase if the activity involved was otherwise extensive and other persons were involved in the criminal activity over which he may not have directly exercised authority, but who were a part of the [9] criminal activity. And certainly in this case, besides himself, McGhee, Vince Edwards, Joe Tidwell, Dexter Hammond, Joiner, Tonka, Lockett, Lillian James, and many, many others were part of this criminal activity and were, therefore, showing that there were great numbers of people that were involved, and he would be responsible for those, as far as I'm concerned.

And based upon that then, I would find that he is a leader, and he does fall within 3B1.1(a). Even though his involvement or his personality or his activities were not as extensive as Box's or Tidwell's or Karl Fort's, he still had the same role in making the same ultimate decisions.

They just might have said more and done more. Therefore, the court must impose a four-level enhancement.

As a result of that and because of those findings, I would deny the motion for a downward departure that he played a minor or minimal role. That is simply not justified under the facts.

All right. The court will next consider the possession of the weapon. Mr. Zuba.

* * *

THE COURT: Thank you, counsel.

The court will make the following findings as it relates to 2D1.1, and the court is taking into consideration the entire trial again and my recollection of the evidence.

[10] On March 20, 1992, defendant was arrested, and at that time there's no question that he had a weapon in his waistband, and he threw it to another person. I think it was a person by the name of Pascal. The court, therefore, clearly has him in possession of a weapon. The only other requirement is that it occurred during the offense, and the case law – and I cite to U.S.A. v. Cantero – provides that 2D1.1(b)(1) does not require the defendant to actually possess the firearm; that is, it may be constructive possession. And here, for this incident, it's not constructive; it's actual possession.

Secondly, the government is not required to show a connection between the weapon and the offense. All the government is required to show is that the weapon was possessed during the offense. And looking at the comments under 2D1.1, Comment 3 states in part that the adjustment should be applied if the weapon was present,

unless it's clearly improbable that the weapon was connected with the offense, and the example they cite is the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. And they pretty much – the Seventh Circuit has limited the exception to that type of factual situation.

Now, this is a little bit different because the crime is a continuing crime, it's a continuing conspiracy, and the court believes there has to be shown some sort of connection. And I believe that the connection is made by the fact of Box's [11] testimony and the fact of McGhee's testimony and the fact of other intercept tapes that at about this time, the activities of the organization were going on, and there were a great many people in the organization. There were shootings at or about March 20th, and those shootings are by rival gang members and for people trying to horn in on the drug trafficking. So, I think there is a connection, based upon all the evidence, that at least that weapon was carried in connection with the offense.

On April 22nd, 1993, the defendant is arrested in a home where a loaded weapon is found in the living room. Reynolds Wintersmith, I think, is going up the stairs about the time that the police come in. So, it's reasonable to assume that Reynolds just got there. But the purpose of that place was – and there were narcotics ultimately found – was they would sell drugs. And at that time McGhee, at least, testified that he believed the defendant could have been operating as a runner about that time. Even though he was a Mob member, certain people acted for certain periods of times as runners. Be that as it may, I think it's reasonably foreseeable to Reynolds Wintersmith under all the evidence that that weapon could have been

there at that particular drug house where money was found and some quantity of drugs.

The May 26th, 1993, incident at 119 North Henrietta, there was a shootout. The police were called. They do find [12] Reynolds Wintersmith in the attic area or the second floor in a bed. Weapons are found in a separate room. I don't think under the circumstances it's been shown to me to be actual possession, and, second of all, I don't think there's been enough shown to me as constructive possession of that weapon. On the other hand, could he reasonably foresee it? Defendant goes there regularly. It was a meeting place. And, as far as I'm concerned, due to the fact of all the evidence in the case, weapons were present for the very reason that that incident happened that night, to protect themselves, and there happened to be a shootout.

Finally, McGhee also testified that he saw the defendant with a weapon during the course of this conspiracy. And so, all those instances show the defendant to have possessed a weapon of the ones I've just stated. In addition to that, at the time of Tidwell's arrest, Sam Tidwell and Box's arrest, weapons are found in their homes, and I think that it is reasonably foreseeable, and those weapons were reasonably foreseeable to the defendant, that these two possessed weapons and, secondly, that those weapons were possessed in furtherance of the offense, that is, that they were used for protection.

Therefore, the court must impose an enhancement of two levels under this particular subsection, and I do so.

Mr. Zuba? Next.

MR. ZUBA: Drug quantity.

[13] THE COURT: I beg your pardon?

MR. ZUBA: Drug quantity then.

THE COURT: Yes, that's the only – as I understand it, that's the only one that would be left.

* * *

THE COURT: Thank you, counsel.

The court has already found that Mr. Wintersmith was one of the leaders of the group, being a core member, and, as such, the court would further find that he can reasonably foresee the acts of other coconspirators who were members of the core group, and he could reasonably foresee the acts of runners and workers who were carrying out the distribution of cocaine and crack cocaine.

And, specifically, the reasonable foreseeable conduct of the coconspirators must focus on the scope of the defendant's agreement with the coconspirators under United States v. Edwards, and here the scope of the conspiracy was from early 1991 through July 28th, 1993, to distribute cocaine and crack cocaine and that it was distributed through an organizational effort where a certain group, that I've referred to as the core group, organized it. They got runners to distribute to the workers to sell it on the streets. They insulated themselves as core members; that, for the most part, they kept in communication by cellular telephone or pagers; that they had weapons to protect their stash of narcotics and [14] their money; and that this was operated out of various houses throughout the West End of Rockford.

Here the evidence is overwhelming that the defendant, as a core member, knew or could reasonably foresee the conduct of all those in the conspiracy – not just the core members, but those who were working as runners and workers – that they were carrying out the plan to distribute cocaine and crack cocaine.

Therefore, based upon that, the defendant would be responsible for those quantities of cocaine or crack cocaine which are sold or obtained by the group for sale. And the court has previously found that he joined the conspiracy as a member of the core group in early – or in the spring of 1992.

The purchases to the group at that time, the purchases that is, that the group made, as Box testified, in the early spring, Sam Tidwell buys one kilo from Sherman Ollison. I'm not going to attribute that to the defendant because it's too close to the period of time he became a core member. When they say the spring, I don't know when that is necessarily. It's too general.

On the other hand, the court will find that Box gave credible evidence that around or slightly after Mother's Day in 1992, Box and Willie Tidwell bought three kilos from Sherman Ollison for the group and that several weeks later Willie Tidwell and Reynolds Wintersmith went to Texas and bought three [15] kilos and brought it back, and then two weeks after that, Willie Tidwell and Willie Johnson bought three more kilos, and they were caught by police in Missouri and that three kilos were seized by the police.

In addition to that, on May 6th, which is before Mother's Day, but after the time that the defendant

became a part of the inner group, there was a seizure in Chicago of three kilos from Sherman Ollison, a person identified as Sherman Ollison, and Box verifies that, and Box verified in trial number one that only one of those kilos was designated for the group in Rockford of which the defendant was a member. Therefore, I can attribute a total of ten kilos to this particular core group in which the defendant was one of its members.

The evidence of ten kilos is corroborated by testimony of the seizure of those three kilos in Chicago, the seizure of the three kilos from Willie Tidwell and Willie Johnson that I mentioned. There are cashier's checks and other testimony how they attempted to obtain bond for Willie Tidwell and Willie Johnson. There's Purvis' testimony of the amounts that were being distributed at that time and McGhee's testimony of amounts later when he became a part of the organization that they had supplied.

As far as I'm concerned then, there's adequate corroboration that ten kilos were brought into Rockford for [16] sale. The question then is what were those – they were brought in in powder form. How much do I attribute to crack, and how much do I attribute to powder? And this is a key decision that I've had to make throughout the various defendants because crack cocaine being – the penalty being so much more onerous, the court has used a conservative figure of 50 percent cocaine and 50 percent crack. I have done that because although Box testified on several occasions, he gives general testimony and then says, well, it was two thirds and then mostly, and then in some cases he said it's primarily, and other times he said it's the majority.

I do believe the evidence supports that crack cocaine was being distributed at that time and so was powder cocaine, and on that basis I'm going to allocate 50 percent of the ten kilos to crack cocaine and 50 percent to powder cocaine. That in itself is over 1.5 kilograms, and that is enough to put the defendant in a 38 base offense level. The court must make further findings as to whether other crack was brought in or other cocaine was brought in from other sources.

The testimony is that Ilander Willis in the summer of '92 and throughout 1993 supplied cocaine to the group. The testimony by Box is that two kilograms were supplied in the summer or spring of 1992. I have no reason to doubt that. I think it's believable, considering the amount of cocaine being sold at that time, and I will allocate two kilos to that, one [17] kilo being crack and one kilo being cocaine, for the reasons that I've said earlier.

The court also heard testimony that six or seven kilos were provided to the group from Ilander Willis in 1993. That is an amount that I think is verifiable and corroborated by the following evidence. First of all, there's a seizure of almost one kilo of crack cocaine on May 28th, 1993, at Gloria Holmes' house, which although she not being a member or a part of the organization, it was stored there by her boyfriend, Montie Russell, who was a part of the core group, and that I think there are calls by Sam Tidwell and Montie Russell at about the time of the seizure which link – in addition to Box's testimony – link this crack cocaine to the crack cocaine that was being distributed by the conspiracy here. That alone is a large quantity of crack cocaine, which is indicative that if that

amount is being stored, there's a lot more, as evidenced by the other testimony. So, that supports Box's testimony.

In addition, the wire intercepts that occurred from April to July 28th, 1993, show the extent of the organization and the activities and the sales, including crack cocaine and powder cocaine, and Willis' name appears in several of the tapes, and in several of the conversations he himself is talking about the sale. So, that verifies the fact that he was making sales to the organization.

Purvis' testimony shows the amounts that he was [18] running, which is a large amount. McGhee was working from the fall of 1992 through the time he was arrested, and when he was arrested, he was found, I think, with crack, powder, and heroin – small amounts, but it verifies the fact that crack cocaine was still being dealt in that area on July 28th. Drugs were seized in other raids on July 28th where Mob members were involved. It shows their link to cocaine and cocaine base being distributed.

The body recorders and tapes on Jones show quantities of cocaine were still being arranged for during that spring and summer of 1993. There's baggies seized in various arrests throughout the West Side during this period of time and other matters that were unrelated to the raid on the 28th of July, but all those baggies show an active distribution method. And in one circumstance, they found 40,000 baggies that Donald Box testified to and were actually found at a house – I think it was 1123 West State Street. And there were many – on many of the people were found pagers or in their homes pagers and

cellular phones, and there's evidence of surveillance, evidence of telephone calls on a frequent basis, which shows the extent of this organization.

Finally, drugs were found in other various raids, not just on the 28th, but drugs were found at various times when the local police made arrests of these members or confederates, and trash evidence supports the significant quantities of drugs [19] which were being distributed.

Therefore, I can conclude that – I believe that there's sufficient evidence to support that eight kilos were sold by Ilander Willis to this organization, and I can attribute, based upon all those facts, at least four of those kilos to crack cocaine and the other four to powder, inasmuch as Decarles McGhee said he was dealing about equally in both, and I've used a conservative estimate based upon that testimony as it relates to determining whether it ought to be allocated to crack or powder.

Therefore, based upon all those findings, the defendant is clearly, by virtue of the crack cocaine and his knowledge that he could reasonably foresee that, it's an amount substantially over 1.5 kilograms of cocaine base, and, therefore, he would fall within a level 38, and I'll make that finding.

The court has then completed the objections that have been made. Are there any others that I have not treated?

MR. SAHLSTROM: No.

THE COURT: Mr. Zuba?

MR. ZUBA: Not that I'm aware of, your Honor.
(Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

[20] I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom

_____

UNITED STATES DISTRICT COURT
NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA

V.

HORACE JOINER

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 93 CR 20024-12

Donald Sullivan
Defendant's Attorney

(Filed Dec 9 1994)

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 846	Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base	07/28/93	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such court(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 50.00, for count(s) One, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: Unknown

Defendant's Date of Birth: 07-28-63

Defendant's Mailing Address:
Metropolitan Correctional Center
71 West Van Buren Street
Chicago, IL 60605

Defendant's Residence Address:
Same

Tuesday, November 22, 1994
Date of Imposition of Sentence

/s/ Philip G. Reinhard
Signature of Judicial Officer

Philip G. Reinhard, Judge
Name & Title of Judicial Officer

November 22, 1994
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of One Hundred Twenty-Six (126) Months.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends defendant be incarcerated in an institution nearest to Rockford, Illinois that does not have any cooperating defendants in this case.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) Years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled

substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 1,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending November 22, 1999.

[ ] ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____
_____
_____

OR

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ____ ending ____.

[ ] be ineligible for the following federal benefits for a period of ____ ending ____:

*(specify benefits)*_____
_____
_____

[ ] successfully complete a drug testing and treatment program.

[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.

THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): See attached transcript of Rule 32 findings.

Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: IV

Imprisonment Range: 110 to 137 months

Supervised Release Range: ___ to 5 years

Fine Range: $ 12,500 to $ 4 Million

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Midrange sentence reflects his involvement and prior criminal history.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	Docket No. 93 CR 20024
Plaintiff,	)	Rockford, Illinois
v.	)	Tuesday, November 22, 1994
HORACE JOINER,	)	9:00 o'clock a.m.
Defendant.	)	

EXCERPT OF PROCEEDINGS
(Sentencing Hearing)
BEFORE THE HONORABLE PHILIP G. REINHARD

[2] (The following is an excerpt of proceedings:)

THE COURT: The court now has completed the testimony as it relates to the Sentencing Guideline calculations, and I would first say that since there have been no other objections to the Guidelines and also no objection to the facts, Mr. Sullivan and Mr. Joiner – other than you contest the facts that are set forth as it relates to the government's version. Are there any other facts that you contest?

MR. SULLIVAN: Yes, your Honor. I checked this morning over at the Clerk's Office, the Winnebago County Clerk. They were unable to provide a docket entry for an alleged conviction for obstructing a police officer – or obstructing justice and trespass.

If the Probation Department has a copy of the docket sheet for that, we would appreciate it. If not, then we

would interpose an objection as to the sentence enhancement included in the presentence report.

THE COURT: Which one? Turn to your presentence report and tell me which one you're objecting to.

MR. SULLIVAN: Going through the Worksheet C –

THE COURT: Well, wait a minute. Go to Page 10, the defendant's criminal history. Isn't that what you are addressing?

MR. SULLIVAN: Yes, that can be found in several places.

[3] THE COURT: Right. Let's go through 10, 11, 12, 13, and part of 14.

MR. SULLIVAN: It would be line 453 on Page 12.

THE COURT: Do you have a certified copy of a conviction or a copy of the docket?

MR. OSBORNE: Your Honor, that's what I'm looking for. What happened on that one, they were consolidated. That's why he didn't receive any points for the 10-10-85 battery and criminal trespass because it was – so, I've got a feeling that it might have ended up under that case number, 5804.

THE COURT: What you're saying is the conviction you have attributed one point to on line 453, which is saying he pled guilty – and I don't know whether he pled guilty to the battery or the obstructing the police officer – was consolidated for sentencing with the offense on line

468, and it appears that both offenses were – the defendant was sentenced on 10-17-85

MR. OSBORNE: Correct.

THE COURT: So, you have not attributed any points to the latter conviction that occurred on 10-10-85, but you have on line 453 as to the battery and obstructing a police officer that occurred on 7-22-95.

MR. OSBORNE: Correct.

THE COURT: Do you have a –

MR. OSBORNE: Your Honor, that information from that [4] particular one, I'm looking for the Clerk's, but the information I have was provided by the State's Attorney's Office on their – which I don't think I can –

THE COURT: Well, are you contesting that he was convicted of that 7-22 offense?

MR. SULLIVAN: We would ask that the Probation Department would provide the verified copy of the conviction. I checked the court records, and I was unable to find any –

THE COURT: Well, it sure would have helped if you would have called this to our attention before this.

MR. OSBORNE: That's not what they asked for in their objection, your Honor.

MR. ZUBA: I still don't hear that he's making an objection. Is he saying it didn't happen?

THE COURT: Well, I get an objection that he's objecting to that one point being assessed.

MR. ZUBA: Well, he ought to claim on the record that it didn't occur if he wants to object to it.

MR. SULLIVAN: I'm sorry? I didn't –

MR. ZUBA: I think –

THE COURT: Well, are you objecting to that?

MR. SULLIVAN: I'm objecting to the one point assessment if we're unable to provide a verified copy of the –

THE COURT: Well, you haven't – I'm in the middle of a sentencing hearing, and I have another sentencing hearing [5] this afternoon that's going to take all day, and I'm tied up all day Wednesday with sentencing hearings. That's why you make objections ahead of time.

I'm going to do this. I'm going to find that it appears to me to be accurate. There's no other information that's been submitted that it's inaccurate, other than you saying, "Well, I checked over there," and you couldn't find it. I'll ask the Probation Office and the government to see if they can find a certified copy or provide a certified copy –

MR. OSBORNE: Yes, your Honor.

THE COURT: (Continuing) – but I'm going to proceed on with the sentencing hearing and if the probation officer at a later point comes back and says that point shouldn't be attributable to the conviction because it never was a conviction, then they can call it to my attention, and I'll recalculate it, but I'm going to proceed ahead with the sentencing hearing.

Now, was there some other objection that you had?

MR. SULLIVAN: No, your Honor.

THE COURT: All right. I want to tell you this, that as far as other arrests that didn't result in convictions, I'm not considering those. Those start on line 557 and go through until 639, but I'm not considering those.

Let's take up at this time then your objection to the Sentencing Guideline calculation of criminal history. I [6] believe you had an objection to that.

MR. SULLIVAN: That's correct, your Honor.

THE COURT: And that is at the bottom of the next to the last page of your objections, and it reads you object to the criminal history points as calculated by the government crediting Mr. Joiner with one point for the October 17, '85, conviction of obstructing a police officer and criminal trespass to land is inappropriate. The imposition of a point for a relatively minor transgression unfairly inappropriately enhances the punitive effect of the federal drug statute. The credit of the conviction for state misdemeanors results in an outcome which far exceeds the punitive intent of both the state criminal statute and the federal drug act. Such accumulation amounts to double jeopardy.

As far as I'm concerned, the Sentencing Guidelines do take into consideration misdemeanors as qualified if they meet either the amount of time in jail or they reach the appropriate level of probation or supervision. Here I've already credited – pursuant to your oral objection, I've already said that absent somebody showing me that there wasn't a valid conviction for the offense listed on

line 573 – I'm sorry – 453, that shall be counted, and we're not counting the other offenses that he pled guilty to and was sentenced on that date. So, I make these rulings that the criminal history category is correctly calculated.

[7] Would it make any difference, Mr. Osborne, if there were one less point?

MR. OSBORNE: I believe he would then have a criminal history of six, and I believe –

THE COURT: One less point.

MR. OSBORNE: Yes.

THE COURT: Six points.

MR. OSBORNE: He'd have a total of six, and he's a four now, and I believe he would be a criminal history category three.

THE COURT: All right. Well, I'm considering him as a four, absent any evidence that that one conviction on line 453 should not be counted.

MR. ZUBA: So the record is clear, the evidence in support of the conviction, as per the probation officer, is information from the files of the State's Attorney's Office, which was in the county where the conviction was secured.

MR. OSBORNE: Yes.

THE COURT: All right. Well, I expect over the lunch hour that somebody will verify that.

MR. OSBORNE: Correct.

THE COURT: All right. That takes care of that objection.

I'd like to proceed now, if you both agree, with the other objections that are raised to the Sentencing Guideline [8] calculations. Is that agreeable with the government?

MR. ZUBA: It is, Judge.

THE COURT: Is that agreeable with you?

MR. SULLIVAN: It is, your Honor.

* * *

THE COURT: All right. The court is ready to rule on both objections made or the objection made that he's not a leader.

First of all, the court has looked at 3B1.1, and while the government seeks a two-level increase under subsection (c), it seems to me, to be consistent – if they were to be consistent – that he was a manager or supervisor. You're not contending he's a leader or an organizer. You're contending, aren't you, that he's a manager or supervisor?

MR. ZUBA: Yes, Judge.

THE COURT: If he was a manager or supervisor, he probably would qualify under (b), not (c), because it is shown to be an otherwise extensive organization. But the court, in determining whether he is a manager or supervisor, looks at the application notes, and in particular I look at Application Note 4, and under Application Note 4 there are various factors that the court is to consider in distinguishing a leadership and organization role from one of mere management or supervision. So, that's the test.

Now, at first blush it seems like, well, that is [9] applicable to determine whether he qualifies as an organizer or leader, but the case law from the Seventh Circuit – and I cite United States v. Young, 34 F.3d 500 – these same factors are employed also to determine whether a defendant qualifies as a supervisor or manager at all. So, I consider those factors as it relates to whether he plays a manager or supervisor's role.

Looking first at the exercise of decision-making authority, I don't think there's evidence that he was in the decision-making authority. He took orders from Box and the core group.

Secondly, the nature of participation in the commission of the conspiracy offense. He is involved only for a limited period of time when he was released from jail May 7, 1993, and the conspiracy ended July 28th. So, he's only there for a limited period of time. As far as I'm concerned, he was never a worker, and I don't find that he's a runner from the evidence. His function, in my judgment, was to in some instances do some enforcement for the organization, and in a limited way he was hanging around all the time – he apparently wasn't employed – and he would inform Box or tell other members of the core group that they're out of supplies. He would also hang around, as Box said, but he was there. He wasn't paid, from any evidence that we have. So, under that factor, I don't find that to assist in qualifying him as a manager or supervisor.

[10] Recruitment of accomplices. There's no evidence of this. The fact that he went out on one occasion and came back with some workers to beat somebody up isn't,

to my knowledge, recruitment. We don't know how he got them. We don't know anything more about the incident.

Fourth, the claimed right to a larger share of the fruits of the crime. The evidence is that he didn't get any. Obviously, he didn't participate in splits. There was no indication that he was paid like a worker or like a supervisor. There's simply no evidence of it. Therefore, that factor doesn't help this court in determining that he is, in fact, a manager or supervisor.

The degree of planning or organizing the offense. Again, his involvement appears to be at a point where he carries out the orders of somebody else.

Number six is the scope of illegal activity. Really, his activity, in my judgment, is disciplining some of the people who didn't pay off their debt, either runners or workers, and that's the extent of it. That doesn't show a supervisor capacity.

Finally, the degree of control or authority over others. I think it's stretching it, as I said before, that the incident when he got some other people to beat up Blackie McGhee – I don't think that one incident shows that he had a leadership role. The fact that the taped conversations that [11] Mr. Zuba has referred to are evidence of his involvement in the conspiracy, but, in my judgment, don't show that he was a manager or supervisor, particularly when there's no evidence that he ever controlled runners or workers. Therefore, the court, based upon the evidence that's before me, will not find that there should be any enhancement as to his role in the offense.

The defendant has requested a downward departure of either four levels or two levels under mitigating role, 3B1.2. The court finds that subsection (a), the four-level decrease, applies to a defendant who is plainly among the least culpable of an organization, such as an occasional worker, in my judgment, or a security person under the evidence or one who is involved in one incident.

Here the court finds that the defendant had direct access with the core members of the Mob, had enforcement responsibilities that he undertook from time to time. He was present at locations where transactions were occurring. So, it's beyond just a single transaction that's contemplated for a four-level reduction as stated in the commentary note. I find that he was involved for a significant length of time in various activities of the conspiracy.

As to subsection (b), a minor participant, that is one who is a participant who's less culpable than most other participants, but whose role is not minimal. His activities [12] are consistent with others that are not a part of the core group. His activities are consistent with other persons who worked on and off for the organization, both workers and some of the runners. All these people worked in some way or other for the organization and were given orders, and this defendant falls within the category not less than those other persons.

In fact, as the government points out, his role appears to be a little more active than just a worker in the sense of activities of a more dominant role in the organization. And I only say that because the workers are probably there on a daily basis. He wasn't working on a daily basis, but he had greater access, apparently, to the

leaders, and, therefore, he knew what was going on, and he's not entitled to any reduction for a mitigating role.

The court has made its rulings on that, and I will now proceed to the dangerous weapon enhancement.

* * *

THE COURT: Thank you, counsel.

The court will make the following findings as it relates to whether there should be a two-level enhancement under 2D1.1(b) (1), and that's if a dangerous weapon was possessed, then it's increased by two levels. And it's not used; it's possessed.

The court will find that there's no evidence that the defendant himself directly possessed a weapon, and both Box and [13] McGhee testified that they never saw him with a weapon. The evidence then boils down to as to whether he could reasonably foresee that weapons were carried by others in furtherance – or possessed by others in furtherance of the conspiracy.

There's no question in my mind that Sam Tidwell, under the evidence, possessed this weapon that's shown in Exhibit 201-A and that he possessed it during the time of the conspiracy and possessed it at the time that he was arrested in his home, that it was found in his home, along with both cocaine and other weapons and money. Therefore, it is certainly clear that it was possessed by him during the offense, and it's connected to the offense.

A firearm is generally used to protect oneself, and in this drug trafficking it's to protect the money or the illegal substances. And the court just wants to cite the law, U.S. v. Cantero. It says that an enhancement under

2D1.1(b) (1) does not require the defendant to actually possess it – it may be in a home or an apartment or a car – nor is the government required to show a connection between the weapon and the offense. All the government is required to show is that the weapon was possessed during the offense, and I think there's a connection here. It's stronger as it relates to Samuel Tidwell.

In addition, the most recent case I have found, United States v. Linnear, states that if the weapon was present that [14] the Guidelines state that this enhancement should be applied if the weapon was present unless it is clearly improbable that the weapon was connected with the offense, and that's the limited exception that is talked about in the notes and is talked about by counsel, if it's in a closet and it's a hunting weapon. Well, this isn't a hunting weapon. This is a weapon that was used to protect the persons and the property of drug dealers.

Now the question remains is whether the defendant here should be responsible for the conduct of another coconspirator under the theory as to whether he could reasonably foresee that this gun would be possessed during the commission of the offense. The picture that has been shown to me, 201-A, has the defendant, along with two other persons, both of them posing with guns, one of those being Sam Tidwell, who has a pistol that's later located at his home at the time of his arrest.

The court further acknowledges other evidence in this record that shows the defendant is around those who are participating in the drug transactions. The defendant is an enforcer, and there are various tapes that show he's – at least on one tape he's talking about a clip to a

weapon. It would be unreasonable not to infer that he knew that this weapon was a part of protection for the members of the organization.

I simply can infer from all the evidence as it relates to this defendant that he could reasonably foresee that this [15] weapon was possessed during the course of the offense and would be carried by another person who he knew as one of the leaders of this organization, and it's carried in furtherance of the criminal purpose for which the defendant was convicted. Therefore, the court will enhance two levels under that particular Guideline.

The next Guideline that I want you to address goes to the base offense level, and the government may proceed.

* * *

THE COURT: The court is ready to make its factual findings as it relates to the base offense level.

First of all, as to whether the defendant should be responsible for the quantities that the government has attributed to sales in, let's say, June of 1993 at the location at Ma & Pa Beasley's, the court will first say this, that I've considered my role is very important as far as the responsibility I have to determine to the best of my ability from the evidence what quantities can be attributable to a particular defendant, and in doing so, again, I've reviewed the entire trial, as well as the testimony that I've heard today.

At trial, Decarles McGhee, who is a government witness and who was an active runner during the time that the defendant was associated with the conspiracy – and that's from May 7 until July 28, 1993 – McGhee was an

active runner. He attended runners' meetings. He was in and around the West [16] State area, which is near Ma & Pa Beasley's, and he says that he never saw Joiner in connection with this offense. He knows nothing about Joiner. And I say that is evidence that would run contrary to Joiner being responsible for sales in that area because McGhee was an active runner and was working in that area, and he never saw him – McGhee never saw him at Mob meetings or never saw Joiner in possession of drugs or a gun.

Purvis, although he was out of – another government witness – but Purvis was out of the distribution at that time. He didn't know Joiner, and he was in jail for part of the time, but he was out by May 10, but he was not active in the group at that time. So, all I can say is that he doesn't help either side, except in a minimal way would be he would have heard of it on the street, but he said he never heard of Joiner or heard of anybody talking about Joiner.

Critically then, I must look at Box's testimony and look at the tape evidence, as well. Box on cross-examination stated flatly that the defendant never dealt in drugs. Now, that's cross-examination during the trial. He also said that the defendant never cooked or bagged cocaine. He wasn't involved in splits. He wasn't a member of the Mob. And he never saw the defendant with drugs.

What he did state is that for a couple of – for a few weeks, he let him, Box, or Horton know if workers were out of work. That's what he stated at trial. Essentially, today he [17] backs off of that a little bit. He said, well, Joiner was just around, and if somebody was looking for

a runner, maybe they'd come up to Joiner, if he were there, and Joiner would tell the runner or tell somebody else to get a runner.

There's no question in my mind that Joiner is around during this period of time and that he knows somewhat what's going on, but the extent of his involvement, beyond the enforcement aspect, which is backed up in the tapes, is just a matter of speculation. To attribute the large amounts of cocaine and cocaine base that Box says were distributed by another person, Horton, during that period of time and then say, "Well, Joiner ought to be responsible for a part of it," is just stretching it too far.

First of all, I have some doubts as to the credibility of Box on that issue, and, therefore, I find it very difficult to attribute amounts of cocaine, particularly cocaine base, where he would be getting a life – near a life sentence if I accept the arguments of the government, and he being involved only for two months, and everybody acknowledges he's not a part of the leadership. They don't even give him a particular role in it. I just have some very, very serious doubts as to the credibility of Box. He's tried to generalize – in this instance.

I believe him, his credibility, in a lot of what he's said, but as to estimating the amounts and what he might [18] estimate that Randy Horton sold at that time and what he guesses that the defendant might have done at the location is simply too speculative to attribute cocaine or cocaine base to him. And particularly when he says, well, at one point it might be 75 percent was crack. It's just too speculative and the consequence is too great for this court, for the limited role that the defendant had in

the matter, to say that it's been proved. It might be a fact. Maybe he has a greater involvement, but it simply has not been proved to me.

As to the amounts that the government also seeks to attribute to him as far as certain packs that Box says were given by Joiner to Parker, that is corroborated by the tape. There is corroboration of that, and it is such that I believe that there was a transaction that Parker hadn't paid off, and the defendant was attempting to collect that, that it is one pack, but there's no evidence that that was crack cocaine, but it is powder cocaine.

I will find that Tape 71-1 corroborates Box's testimony. And while the court recognizes that corroboration is not necessary, that I can believe the testimony of a person without corroboration not just on this issue, but any issue, the court, given the nature of Box's testimony and the generalities as it relates to the quantities, I am doubtful without some corroboration. So, therefore, I find that approximately seven grams of cocaine the defendant is [19] responsible for as it relates to the transaction with Parker.

There also is a second transaction with Relly, who is a brother to Antonio Craig. That is one pack. It's been testified to by Box that it is crack cocaine, and one pack would equal one-fourth of an ounce, and that is approximately seven grams. And I say approximately because there's no measurement of these particular amounts. I recall that that testimony, Box's testimony, is in part corroborated, and I believe it's on Tape 71-1, but I want to check that. Is that the government's recollection that it's 71-1?

MR. ZUBA: Yes, Judge.

THE COURT: That is a conversation between Antonio Craig and Horace Joiner, and I think that that does verify the fact that there was an amount that Craig's brother had to pay off, and that amount I will find to be one pack, based upon Box's testimony, and based upon Box's testimony it's crack, and I think, as I say, the tape verifies parts of Box's testimony, and, therefore, I will credit it all. And that is approximately seven grams of crack cocaine.

The other is one pack of crack cocaine that is attributable to a Michael, and that is corroborated by Tape 53-2, and the testimony from Box is that it's one pack, and that was trial testimony, and then his testimony here is that it's crack. I believe that testimony. It is corroborated by the tape. And that's approximately a fourth of an ounce or [20] approximately seven grams.

There is testimony of Blackie McGhee being beaten up for the collection of cocaine that he owed or crack cocaine. The court is not – that's too nebulous at this point to see exactly when it was owed, when the defendant – what the defendant's knowledge was as to that. I don't think it makes any difference because looking at the Guidelines, I'm approximating 14 grams, and I'm approximating it because the Witness Box says, "We didn't weigh it, but we kind of cut it."

So, even if I were to attribute seven more grams or approximately seven grams to this McGhee incident, that would total approximately 21, and I would not – and that would move him up over 20, and I'm not about to say

that the testimony has been with that much precision that it could and should increase the level for the defendant.

I'm going to find that there's approximately 14 grams of crack cocaine that are attributable directly to the defendant from the two sales, the one with Relly and the other one with Michael, and that's the extent that is provable, as far as I'm concerned. Now, that provable amount being what the defendant is directly responsible for, he shall then, based upon possessing – I believe it's five grams to twenty grams – he falls within a category level, I believe, of 26. Five grams, but less than 20 grams of cocaine base, is a level 26. That's the level that I find. I find it's between that of [21] those amounts. The fact that he possessed – also found that he had seven grams of cocaine powder does not increase it in any way that it would get into a higher level.

Therefore, he falls at a level 26. My calculations are that he then has two additional levels for possession of the weapon. That's a level – total of level 28. He then is in a criminal history category of four. The court then goes to the sentencing table, and he faces a term of imprisonment of 110 to 137 months.

Are there any questions about those calculations? I want to make sure that – after I have made my decisions, I want to make sure that the lawyers understand then what the range that I find is available.

MR. ZUBA: No questions from the government, Judge.

THE COURT: Do you understand where the range is?

MR. SULLIVAN: Yes, your Honor.

THE COURT: All right. At this point in time, I believe I've answered all the objections that you've had; is that correct, counsel?

MR. SULLIVAN: That's correct, your Honor. (Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

[22] I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

_____

Mary T. Lindbloom

UNITED STATES DISTRICT COURT
NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA V. JOSEPH TIDWELL (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987) Case Number: 93 CR 20024-8 Richard Butera Defendant's Attorney (Filed FEB 6 1995)

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[X] was found guilty on count(s) One, Five, and Six after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 846	Conspiracy to Possess With Intent to Distribute and to Distribute Cocaine and Cocaine Base	07/28/93	One
21 USC § 841(a)(1)	Possession With Intent to Distribute Cocaine Base	04/30/93	Five
18 USC § 924(c)	Used and Carried a Firearm in Relation to a Drug Trafficking Crime	04/30/93	Six

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[X] It is ordered that the defendant shall pay a special assessment of $ 150.00, for count(s) One, Five, and Six, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 355-58-1330	Wednesday, January 18, 1995 Date of Imposition of Sentence
Defendant's Date of Birth: 08/21/63	/s/ Philip G. Reinhard Signature of Judicial Officer
Defendant's Mailing Address: Metropolitan Correctional Center 71 West Van Buren Street Chicago, IL 60605	Philip G. Reinhard, Judge Name & Title of Judicial Officer
Defendant's Residence Address: Same	February 6, 1995 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Two Hundred Fifty-Two (252) Months on Count One, Two Hundred Forty (240) Months on Count Five to run concurrent with the term of imprisonment on Count One, and Five (5) Years on Count Six to run consecutive with the term of imprisonment on Count One.

[X] The court makes the following recommendations to the Bureau of Prisons:

The court recommends defendant be incarcerated in an institution nearest to Rockford, Illinois, if security concerns permit it. Defendant should be enrolled in a comprehensive drug treatment program.

[X] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district,

[ ] at ___ a.m./p.m. on ___.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Five (5) Years on Count One and Three (3) Years on Count Five to run concurrent with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[X] The defendant shall report to the probation office in the district to which the defendant is released within

72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[X] The defendant shall not possess a firearm or destructive device.

The defendant shall receive drug aftercare treatment at the discretion of the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 1,000.00 . The fine includes any costs of incarceration and/or supervision.

[ ] This amount is the total of the fines imposed on individual counts, as follows:

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[ ] in installments according to the following schedule of payments:

This fine shall be paid through the inmate financial responsibility program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

DENIAL OF FEDERAL BENEFITS
(For Offenses Committed On or After November 18, 1988)

FOR DRUG TRAFFICKERS PURSUANT TO 21 U.S.C. § 862

IT IS ORDERED that the defendant shall be:

[X] ineligible for all federal benefits for a period of Five (5) Years ending January 18, 2000.

[ ] ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

OR

[ ] Having determined that this is the defendant's third or subsequent conviction for distribution of controlled substances, IT IS ORDERED that the defendant shall be permanently ineligible for all federal benefits.

FOR DRUG POSSESSORS PURSUANT TO 21 U.S.C. § 853a(b)

IT IS ORDERED that the defendant shall:

[ ] be ineligible for all federal benefits for a period of ___ ending ___.

[ ] be ineligible for the following federal benefits for a period of ___ ending ___:

*(specify benefits)*_____

[ ] successfully complete a drug testing and treatment program.

[ ] perform community service, as specified in the probation or supervised release portion of this judgment.

[ ] Having determined that this is the defendant's second or subsequent conviction for possession of a controlled substance, IT IS FURTHER ORDERED that the defendant shall complete any drug treatment program and community service specified in this judgment as a requirement for the reinstatement of eligibility for federal benefits.

Pursuant to 21 U.S.C. § 853a(d), this denial of federal benefits does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility.

THE CLERK OF COURT IS RESPONSIBLE FOR SENDING A COPY OF THIS PAGE AND THE FIRST PAGE OF THIS JUDGMENT TO: U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, WASHINGTON, D.C. 20531.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): disputed guideline calculations. See Attached Transcript for Court's Rule 32 findings.

Guideline Range Determined by the Court:

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: II

Imprisonment Range: ___ to ___ months

Count I – 210 to 262 Mos; Count V – 20 yrs; Count VI – 5 yrs consecutive

Supervised Release Range: ___ to 5 years – Count I; 3 years – Count V years

Fine Range: $ 20,000 to $ 4,000,000

[X] Fine is ~~waived or is~~ below the guideline range because of the defendant's inability to pay.

Restitution: $ _____

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): Near Maximum of range based on involvement in offense over a long period of time.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

UNITED STATES OF AMERICA,	) Docket No. 93 CR 20024
Plaintiff,	) Rockford, Illinois
v.	) Wednesday, January 18, 1995
JOSEPH TIDWELL,	) 1:15 o'clock p.m.
Defendant.	)

EXCERPT OF PROCEEDINGS
(Rule 32 Findings)
BEFORE THE HONORABLE PHILIP G. REINHARD

APPEARANCES:

For the Government:	HON. JAMES B. BURNS United States Attorney (211 South Court Street, Rockford, Illinois 61101) by MR. JAMES T. ZUBA Assistant U.S. Attorney
For the Defendant:	MR. RICHARD M. BUTERA (6072 Brynwood Drive, Rockford, Illinois 61114)
Also Present:	MR. BRIAN BARTHOLMEY Special Agent, FBI
	MR. RICHARD BOCKOVER Probation Department
Court Reporter:	Mary T. Lindbloom 211 South Court Street Rockford, Illinois 61101 (815) 987-4486

[2] (The following is an excerpt of proceedings:)

THE COURT: At this time then we'll take certain matters up that are contested that relate to the Guideline calculations. The first matter I'll take up, as I indicated before the lunch break, was the objections to the criminal history category.

I've read the defendant's objections. He objects to all three points set forth in the presentence report under criminal history, and the defendant has set forth his reasons. The probation officer has filed a supplemental report as it relates to those, and I don't know whether the government responded to that or not. I've forgotten.

MR. ZUBA: We did not file a written response, Judge.

THE COURT: All right. I'll give each lawyer a chance to argue those, but to shortcut it, I might give you an idea of my preliminary ruling. That way you can focus in on that, if you care to do so.

Defendant's first criminal history point is for a conviction on 8-23-85 for obstructing a police officer. There is an objection by the defendant as not being a listed offense and that there was no probation or jail sentence of at least 30 days. The court will just say that under 4A1.2(c) it says that, "Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if, A, the sentence was a term of probation of at least [3] one year or a term of imprisonment of at least 30 days or, B, the prior offense was similar to an instant offense."

The court, in looking at the offense of conviction, obstructing a police officer, would find that that appears to be along the lines of hindering or failure to – I believe – well, let me – I looked at this earlier. The offense of conviction is listed as what? I'll ask the probation officer this.

MR. BOCKOVER: Obstructing a police officer, Judge.

THE COURT: And what is it specifically in the state criminal prosecution? What does it allege?

MR. BOCKOVER: It's alleged that he interfered with a police officer who was trying to interview a car thief or a suspect in a car theft.

THE COURT: Interfered with him in what way?

MR. BOCKOVER: The criminal complaint only says he interfered with the officer who was trying to question a suspect in a car theft.

THE COURT: I'm going to find based upon that that that constitutes hindering a police officer, and because it's a listed offense, it can only be counted if that offense was similar to the instant offense, which this is not, or if the sentence was a term of probation of at least one year or a term of imprisonment of at least 30 days. It is neither of those. So, that point I would preliminarily state should not have been [4] assessed. Does the probation officer now, after looking at it, agree with the court?

MR. BOCKOVER: I do, your Honor.

MR. ZUBA: The government agrees, also. So, there's really no reason to argue it.

THE COURT: All right. Thank you.

The next I will take up is the conviction on 11 – well, it looks like the plea of guilty was actually 11-6-87. The offense occurred 11-12-86. And that is listed on Page 13 of the probation officer's report as that the plea of guilty was to the resisting charge. The resisting charge would be a listed offense. Therefore, it cannot be counted unless the defendant received a term of imprisonment of at least 30 days, and that isn't the case here, or the sentence was a term of probation of at least one year.

Here the imposition was one year conditional discharge. Conditional discharge, as set forth in the supplemental report of the probation officer, is considered a sentence by which the defendant is obligated for certain conditions. It says, "A criminal justice sentence means a sentence countable under 4A1.2 having a custodial or supervisory component; although, active supervision is not required for this item to apply. For example, a term of unsupervised probation would be included, but a sentence to pay a fine by itself would not be included."

[5] I agree with those conclusions and that the essence of this is an equivalent to a term of one year probation. Do you wish to add anything further to that?

MR. BUTERA: No. I just would say that it's clear in the Guidelines it says probation. It's not probation. And a conditional discharge is not reporting to anyone. I mean, you could have court supervision where that's not even a conviction where you have to – you're under some terms and conditions.

But I think that if they wanted to make it clear as to what it would be, something other than probation – because, obviously, different states have different rules in terms of the types of dispositions – it would have included those types of dispositions, at least some definition in the Guidelines. It can't be any more clear than what the sentence says, probation, and it's not probation. So, in those terms I would say that it should not apply.

THE COURT: Do you wish to add anything from the government's point of view?

MR. ZUBA: No, Judge. We just believe that conditional discharge is synonymous under this section with probation and should be considered to fall within that category.

THE COURT: All right. The conditional discharge under state law is essentially they can impose conditions on it or not. It's just not a formal probationary sentence. So, the [6] court would find that one point was correctly added by the probation officer.

The next offense is listed as an arrest on 6-15-88, and on 11-8-88 the defendant was sentenced to 30 days' custody. The charge upon which he entered a plea of guilty to was reckless conduct, and reckless conduct is not a listed charge.

And would the probation officer – as I recall, this was firing a weapon inside a house, which was alleged in the state court information to have endangered someone else who was in the house.

MR. BOCKOVER: Yes, sir.

THE COURT: All right. That would appear to be one that's not listed, and even if it were listed, the defendant received a 30 days' sentence for that. Mr. Butera, what further argument do you have there?

MR. BUTERA: I guess the way I read this section – and I guess there's two different ways that you could read it. I read it as that it has to be – in order to give any points for a misdemeanor, it has to be one of the listed ones, and that would be my position as to the way it reads here. Any type of misdemeanor has to be listed here, and then it has to meet the two categories, either/or.

And I understand what probation is trying to say. Any misdemeanor offense – these are exceptions. But that's not the way I read this section. What they're saying is any type [7] of misdemeanor, if it's not listed, then it doesn't matter what the sentence was. It's a conviction. You could have a day in jail, you could have a hundred dollar fine, no matter what it is. You don't have to meet any requirements. If you're under a listed offense, you have to meet these requirements.

My position is that in order to count a misdemeanor, it has to be listed here first, and then it has to meet those conditions. So, it's just a matter of interpretation of the statute. That would be my position.

THE COURT: Does the government want to respond to that? What's your position as far as whether it's listed or not listed?

MR. ZUBA: Well, our position would just follow the reading. It states that, "Sentences for misdemeanor and petty offenses are counted except as follows," and as follows is the paragraph one with all of the listed offenses. So, a misdemeanor generally is counted, unless it's listed, and if it's listed, you go to A and B under that section. So, I think that Mr. Butera's reading is not consistent with the language.

THE COURT: All right. Well, I will find, as I indicated, that it's not one that's listed, and even if it were listed, he got 30 days in jail, and so it would count. So, it counts on both bases. Therefore, I will add that point as set forth by the probation officer.

The net result is it really doesn't change the [8] criminal history category. It only changes the number of points, the number of points being two, and since there are two points, it falls within the criminal history category of two, and I'll make that finding. That's the only contest as far as criminal history category goes.

* * *

THE COURT: All right. The court is ready to rule. Again, this isn't a specific Guideline that I'm ruling on, but it will give the court and counsel the focus of proving up other Guideline calculations.

As I indicated throughout the sentencings of other defendants, Donald Box I believe generally was truthful in his testimony about the organization of the cocaine distribution conspiracy, how it operated, who were the people involved, and who were the members, and I said that absent corroboration that the court would have a

close question as to each individual case because of Donald Box's interest in receiving favorable treatment by the government for his cooperation, and he received substantial benefit. He would have been facing a life sentence himself had all the information come forward through some other witness to implicate him.

In any event, I look at each case for each defendant separately, and in this case, in reviewing the facts, I again point out that it is Donald Box's testimony which says that this defendant became a part of the inner group in either late [9] April of 1993 or early May of 1993. All other persons have been involved in this conspiracy for quite some time, and this defendant alone through Box's testimony is that he became involved in the actual – as a Mob member in the time frame that I've indicated; although, he says that the Defendant Tidwell was a worker and did other things for the conspiracy beginning as early as 1991. The issue is, for various purposes, whether he became a Mob member in May of 1993 close to the time when the Mob was terminated because of their arrests.

The court has looked in all the other cases, as well as this case, as to whether there's corroboration, and in all the other cases there's been corroboration generally by not only one witness, but several witnesses, and sometimes the tapes have corroborated the fact that a person has been a Mob member. Principally, I'm speaking that Purvis has generally corroborated who's been a Mob member, as well as Decarles McGhee, and then the tapes sometimes corroborate that. The court here has to look at, again, the motivation of Box in his testimony and the

whole relationship of Box and Tidwell to the conspiracy that was going on.

The corroboration in this case is lacking as to Purvis. He really got out of the – stopped dealing with the conspiracy in February of 1993. And the one thing that I think is significant is that during the time that he was involved [10] before that, he doesn't say he was taking any orders from Tidwell, and, again, Box doesn't say that Tidwell came in until May.

But what is significant is that Tidwell was present the night that Purvis was called on the carpet by the Mob members for some infractions and was disciplined by – he was disciplined by the Mob members, and Joe Tidwell was present at that time. Now, even Box doesn't say he's a member of the Mob. Yet, Joe Tidwell is there when members of the Mob are inflicting discipline on Reginald Purvis. And in addition to that, at least it's Purvis' testimony, and I believe it, that during the course of this disciplining, he's hit over the head with a bottle by the defendant. This again is sort of inconsistent. If he's not a Mob member, why is he there, and Box on the other hand doesn't say he's a member at that time.

What it points out to me – and other evidence – what it points out to me is that Tidwell is a brother to Sam Tidwell, who is a Mob member, he's a cousin to the Forts, as I understand it, the testimony is Helen and Karl Fort, and he's been with this organization involved in the conspiracy for some time, but his role is not the same. He's been selling, and he's present, and maybe it's because of his family relationship that he's allowed into the places where normally a non-Mob member would not

be allowed. But for whatever reason, he's there, and maybe that explains his frequent conversations on [11] the recorded telephone wiretaps.

In any event, we don't have any corroboration by Purvis, like he corroborated the testimony that other persons were members of the Mob. And, in fact, as I just said, he tells a role that the defendant had which appears to have been one very close to members of the Mob without being one.

Next is Decarles McGhee. Decarles McGhee is a runner for the Mob, and he remains a runner up until the time that he's arrested along with everybody else in the end of July 1993. There's no testimony by McGhee, who's certainly in a position to know and named every other person as a member of the Mob, did not name Joe Tidwell as a member of the Mob, and that's significant as far as the court is concerned. In addition to that, his testimony, as I pointed out earlier, was that Joe Tidwell purchased crack cocaine from him, and that is inconsistent with a role of a person who's a leader in the Mob.

The other supposedly corroborating evidence that the government points to, the tapes – and I've reread each one of those taped conversations. It does show a close relationship that this defendant has with members of the core group or the Mob, but it doesn't show me that he is a member. It just shows a very close working relationship, which is consistent with the testimony of Purvis that he was with the active members, but there's no evidence that he was a Mob member.

The court, therefore, has to find whether he is a [12] member of the Mob, whether it's been shown to me that

he joined as a member of the Mob in May. It's a close question, and I've indicated the reasons that there's no corroboration; but, in addition to that, the latest testimony that Box told the – at least in an FBI statement that, well, at that time he told the FBI that the defendant would be accepted as a Mob member if he could sell so much, and he hadn't sold so much at the time of his arrest, on the stand Box says, "Well, I don't remember that conversation."

It's too much doubt, as far as this court is concerned, to say, based upon that, that I can find his sole testimony to be that this person is a member of the Mob. He's close to the Mob. He did a lot of things, and for that he'll be responsible for. But to say that he's responsible as a member of the Mob for other activities of the Mob, when it hasn't been shown to me that he's involved as a Mob member, I cannot do. Therefore, I'm not going to find that there is sufficient evidence that he is an actual member of the Mob.

* * *

THE COURT: Well, the court has taken time on this because of the very stiff penalties for crack cocaine, depending upon the amounts. It's a hundred times more serious to have crack cocaine than it is cocaine. So, it becomes – every ounce or every gram becomes important as to the level of seriousness in terms of the penalty.

[13] The court is going to make the following findings. First, in the 1991 period of time – and that's the time when Box for awhile was just a worker and later became a member, and he testifies that at that time the defendant was a worker with him and was a worker on a particular

shift throughout that period of time, and I recall that testimony and have reviewed it and have already made findings as it relates to quantities for other defendants, and I'm prepared to do that at this juncture.

I misplaced my notes as far as that early period. Let me take just a second to try to find it.

(Brief pause.)

THE COURT: All right. Previously I had found from that March through mid-August period that approximately 72 ounces of powder cocaine were attributable to a shift, and I believe Box's testimony that the defendant sold powder cocaine during that period of time, as well as from mid-August through September, the total amounts being that Box says, in his recollection and his general testimony, that would be about 87 ounces. 87 ounces translates into 2,436 grams of powder cocaine.

Because of the generalities of Box's testimony and because of the time in question, this being back in 1991, and because there is virtually no corroboration of it, even though I believe Box generally that Tidwell was selling, I have [14] previously discounted that to a level of 10 percent of that amount, and I'll do so here. Therefore, there would be 243.6 grams of powder cocaine that I would attribute to this defendant.

This is the most exact way I can do it. I realize that you take a percentage. I suppose it could be 15 percent. I suppose it could be 30 percent. But because of, one, the generalities of Box's testimony and, two, the distance in time – this occurred back in 1991 – I have used a 10

percent factor. I'll add that this doesn't make much difference in the overall scheme of things because it's the crack cocaine that becomes the crucial factor at a later point.

The court will further find that there is testimony by Box that in December and January of 1993, he estimates today that the defendant sold for him approximately 30 days out of those 60 days and that he was selling about 50 to $150 worth. The government has said, "We'll take the conservative figure of $50 that he would make as profit, and that would come out to be about 15 ounces." Of those amounts, Box estimates that the 75 percent would be crack and 25 percent would be powder. That's an estimate, it's a guess, and it's a serious consequence depending upon what factors I find.

I believe based upon the evidence that it's not just Box's testimony that the defendant was selling, but it's clear from my mind that the defendant was with the members of the [15] core group. As I said earlier, he was with, in February of 1993, the group when it disciplined Purvis, and there are later phone conversations where it clearly shows Tidwell was involved with members of the Mob, in whatever role he had – as a worker or whatever – that he was selling. In addition, he was apprehended by the police, for which he was convicted on count number – I believe is that six? Was it Count 6 that he was convicted of?

MR. ZUBA: Yes.

THE COURT: The small just – what was it? .17 grams. I think it was a small amount.

MR. ZUBA: It was small.

MR. BUTERA: It was –

MR. ZUBA: Point 7.

THE COURT: .70.

MR. BUTERA: Yes.

THE COURT: That further is evidence that at least the jury found possession with intent to sell, and I see no reason why that is not an accurate conclusion.

The court is going to on the conservative side state that of those 15 ounces, and because Box is approximating 30 days – it could be 28 days, it could be 32 days – because of these generalities, the court is going to assess it at approximately 15 ounces and make 50 percent of it crack cocaine and 50 percent of it powder cocaine. That would be 7.5 ounces [16] times what is it? 28?

MR. ZUBA: Yes, Judge.

THE COURT: Is it 28 point something?

MR. ZUBA: 28.2. We've been using 28.

THE COURT: All right. We'll use 28.

MR. ZUBA: 210 grams.

THE COURT: All right. 210 grams of powder and 210 grams of crack. Based on those transactions then – that did not include the additional two ounces that Box said he gave him in February, and I will attribute one ounce to crack and one ounce to powder. I believe Box's testimony in the sense that he did provide the defendant with those amounts. One ounce is, again, 28 grams; is that correct?

MR. ZUBA: Yes, Judge.

THE COURT: 28 grams of each.

And I will further find that based on Decarles McGhee's testimony – and I've reread that again. He testified that he sold the defendant one pack of rock about one time per week for $425 from January 1st 'til the date of their arrest.

I'm going to find that that would be approximately – I'm going to find that there are about 24 weeks. They were arrested on the 28th. We don't know one way or the other whether it's exactly 28 or what it comes down to, but the court is going to find that it would be approximately 24 packs. Four packs equal one ounce, and 24 packs then would be six ounces. [17] You take 28 times six, and you have 148 grams of – and that was testified to be all rock.

MR. ZUBA: That would be 168.

THE COURT: 168?

MR. ZUBA: If you started with six ounces.

THE COURT: Just a minute. Yes. I'm sorry. 168. What total do you have on crack cocaine? I come out so far with 406.

MR. BUTERA: That's what I have.

MR. ZUBA: That's what I have.

THE COURT: The court hasn't made a determination yet on the conversations on the tape. I'm going to take a brief recess. I'm going to look that over and see

whether any of that can be attributable to the defendant. We'll take about a 15-minute recess.

(Brief recess.)

THE COURT: All right. I have reviewed the transcript of the taped conversations that I had previously referred to – 130 and those other ones around that, 128, 129 – and the court can conclude from that and from the other evidence that this defendant was talking about purchasing cocaine or getting cocaine for distribution and that the amount that was going to him was three ounces.

I cannot determine that from these conversations that he was aware of the full kilo that was being distributed to [18] other persons. So, I will attribute three ounces to him, and of those three ounces, I will attribute one and a half to crack cocaine and one and a half to powder cocaine, in conformance with trial testimony that generally half that was being sold was crack and half was powder cocaine. That translates then into an additional amount of 42 grams of crack cocaine, which would total 448 grams of crack cocaine.

Is there any dispute with my arithmetic? Not with how I've arrived with it, but is there any dispute with that?

MR. ZUBA: None from the government. Did you indicate that the two ounces, one was powder and one was crack?

THE COURT: That's correct.

MR. ZUBA: No difficulty with the math. MR. BUTERA: No, Judge.

THE COURT: All right. I then would – that would be the total amount that I have found of crack cocaine, which is attributable to him by virtue of my prior findings. That's 448. As to the powder cocaine, those amounts are 243.6 grams, 210 grams, 28 grams, and 42 grams. I could spell out again where I've arrived at it from, but I think you people can gather that or not?

MR. ZUBA: The government understands.

THE COURT: Mr. Butera?

MR. BUTERA: Yes, Judge.

THE COURT: That totals 523.6 grams. The court, in [19] looking at 2D1.1, under the Guidelines for crack cocaine, he would reach a level 34, which is at least 150 grams but less than 500 grams of cocaine base. If you added in the powder cocaine, which you have to do, but you have to translate that under equivalency tables – and I have done that, and it would not increase it to another level. Do you understand that, Mr. Zuba?

MR. ZUBA: Yes, your Honor.

THE COURT: It would be – you first translate it into marijuana, and it simply would not get to another level, at least by my computation.

MR. ZUBA: I agree.

THE COURT: That puts him at a level 34. Of course, the maximum level he could reach would be 38.

• • •

THE COURT: All right. Based upon the legal standards that I've indicated to you earlier about willfulness and it must be untruthful willfulness and it also must be of a material fact, the court has assessed independently the testimony of all the witness for the purposes of the sentencing hearing. It's not the function of the jury to determine guilt or innocence on the credibility of the witnesses, but I must determine it as for the sentencing, and it must be by a preponderance of the evidence.

The court would make the following findings that in my [20] judgment show untruthful willful statements of material facts by the defendant when he testified. One would be on Page 7, denying obtaining packs of cocaine from Decarles McGhee, contrary to McGhee's testimony. I believe McGhee. McGhee had no reason to lie about this defendant. I watched McGhee while he testified, and I find that his testimony is certainly credible.

As to the next finding of perjury, I would find that the defendant claimed that the cocaine he possessed on April 30, 1993, was possessed only for personal use and not for resale. I think that that has been shown to be untrue; all the actions that were taken by the defendant to avoid arrest, the money he had on him. The tapes somewhat verify that he about this time was involved with the leaders of the conspiracy, and, as far as I'm concerned, that was untruthful.

I further find that where the defendant denied hitting Reginald Purvis in the head and being present when Purvis was hit in the head and denied driving Purvis to the hospital, I believe Purvis' testimony that he was hit in

the back of the head by the defendant. There would be no reason for Purvis to single out the defendant if he could have just as well singled out one of the actual Mob members. Box corroborates this. I think it's perjury.

The next one I would find is that the defendant claimed he was not a member of the Gangster Disciples street [21] gang. And, again, these are material because they're bits and pieces of putting together a conspiracy. They're not peripheral facts. But if the defendant was involved in disciplining somebody, that's obviously a part of the conspiracy, as was being a member of the Gangster Disciples. That would link him with the others. And I certainly saw no evidence by anyone else that that particular symbol was one that's worn by the members of the Masonic church.

As far as I'm concerned, there are photographs and Box's testimony that bear out that he was a member of the Gangster Disciples, which is linked to the conspiracy. The defendant also claimed he was not depicted in any photographs engaging in the Gangster Disciple handshake or flashing a Gangster Disciple hand sign. I think the pictures show that that is not true.

In addition, the defendant claimed he was not aware of or part of any plan or conspiracy to distribute cocaine. I think that is untruthful, according to my judgment of the testimony, and that's corroborated by Walker, Box, McGhee, and the tapes. The defendant was a part of this conspiracy.

The court further would note that the testimony regarding Exhibit 61-2 regarding triple beam, the defendant tried to get out of that conversation, which was

recorded, by reference to – saying that was a reference to clothing size. That's not truthful, and I so find.

[22] He claimed the reference in Exhibit 82 to a zone for twelve meant an ounce of marijuana for $1200, as opposed to an ounce of cocaine for $1200. I believe that's false. Cocaine was going for $1200 an ounce, not marijuana.

And I further find that where the defendant claimed that a conversation with Randy Horton in Exhibit 130 related to a quarter ounce of marijuana, as opposed to bagging up ounces of cocaine, I disagree. I think they were talking about cocaine, and Box verifies that, as well.

Based on all those findings – and I could probably make it to other evidence in the record – I am finding that the defendant's statements at trial under oath were untruthful, willfully so, were material, and is an obstruction of justice under 3C1.1, and I will enhance his sentencing level by two, which now puts it at a 36.

The court has – I think there's only one – well, there's two remaining. The next would be the role in the offense under – I believe that's – is it 2B or is it 2 –

MR. BUTERA: 3B1.1.

THE COURT: 3B1.1

MR. BUTERA: (a) and (b).

THE COURT: 3B1.1, is it?

MR. BUTERA: 3B1.1(a) and (b).

THE COURT: The court is prepared to address that with this statement. Others who have been – I've

found are members [23] of the Mob have been given a four-point enhancement level. I have not found that this defendant is a member.

Is there any other basis, Mr. Zuba, that you can argue? I realize you argue that he is a member, but is there any other basis that you can argue that his role in the offense would be such that any points would be enhanced under that?

MR. ZUBA: My argument would be based on Donald Box's testimony. And I accept your finding that he wasn't a member of the Mob, wasn't officially back in. The only thing that I can ask you to consider is the testimony of Box that he was at meetings. He shared in the split. He had an equal say.

The end conclusion is he wasn't a Mob member, based upon your finding, but what I say to the court is, first of all, there's no reason for Box to lie about those activities. If he was lying about Joe Tidwell, he wouldn't have taken him out in '92. He could have put him in in early '93 when he's at this meeting when he clubs Purvis, which is January of '93. Purvis has no reason to put him in the Mob because when Box puts him in, Purvis is already out.

So, the only thing I can cite is to find Box's testimony truthful with respect to what Joe Tidwell did, and that is that he was present at meetings, he had an equal say, he shared in the profits, and based upon that one July 10 testimony, he obviously assisted in the cut of the kilo.

THE COURT: Well, the court, to shortcut things – do [24] you want to argue?

MR. BUTERA: No, that's fine.

THE COURT: The court has previously indicated that as to Donald Box's testimony as to membership in the Mob, it's not corroborated. Therefore, he can't be given a leadership role for that. In terms of Box's testimony, well, he had splits and the like, that's not corroborated in any way, and that is the same as his testimony that this person for a short period of time was a part of the Mob, and it simply doesn't have the corroboration that's necessary, and it is inconsistent with Box's testimony at least at one point prior to trial.

The court would again reiterate, as far as I'm concerned, the defendant was very active throughout at various points in the conspiracy. In the early part; then not involved in '92, except at a late point; and then involved in various ways in 1993. But there's no indication that he was an organizer. He certainly was not that. And as a leader, I do not find that. Did he supervise other persons as a manager? There's no evidence of that.

Therefore, while he's active, as many other people were in this conspiracy, he's not entitled to any additional points for his role in an aggravating sense, and even though you haven't made the motion, he's not entitled to any mitigating role as a minor participant. He was a major participant in this particular – an active participant as a [25] seller, and, as a consequence, he is treated as such; although, he doesn't get enhanced points for being an organizer or leader or manager.

* * *

THE COURT: All right. The court, of course, has looked at 2K2.4 and Application Note 2, where it specifically says, "Where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm is not to be applied in respect to the Guideline for the underlying offense."

And the court has imposed – or will impose a sentence for his conviction of count – I believe it's six, the possession of a weapon during the course of a felony, and will impose a five-year mandatory consecutive sentence for that. As a consequence, it's my interpretation of this section that where it says, "Where a sentence for the underlying offense -Any specific offense characteristic for the possession, use, or discharge of a firearm is not to be applied in respect to the Guidelines for the underlying offense."

It's clear, as far as I'm concerned – there's one court that disagrees from a different circuit – and I simply believe that that is the clear language of the application notes, and for that reason I agree with the probation officer in not applying an enhancement.

[26] Under the next basis for an enhancement there, which is 5K2.0, isn't it?

MR. ZUBA: Yes, it is, Judge.

THE COURT: The court has considered its discretion under that Guideline. It does have discretion if it falls within the basis for a departure. I exercise my discretion and find that there is a penalty that's prescribed for

the possession of a weapon. That will be the penalty, as far as that is concerned.

I have great latitude in my sentencing under Count 1 and Count 5 within the Sentencing Guideline range that will be established at a 36 level and a criminal history of two, and I will certainly take that into account, the fact that he possessed multiple weapons, but it will not be the basis for an increased enhancement.

So, therefore, I will deny the 5K2.0 request for an enhancement or objection by the government to the probation officer's not giving it that enhancement. Are there any other matters that relate to my calculations of the Sentencing Guidelines at this time? Mr. Zuba?

MR. ZUBA: No, your Honor.

THE COURT: Mr. Butera?

MR. BUTERA: No, Judge. Excuse me. (Brief pause.)

MR. BUTERA: The only other matter, Judge, in light [27] of – and it's hard to anticipate what the court's findings are going to be, and they were not argued in my objections because of what I thought was going to be the scenario of everything, but there is what the court can consider for a mitigating role in terms of Mr. Tidwell, if he was a minor participant, where there can be a two-level decrease, and I would ask the court to consider that. I don't have the section off the top of my head, but I know that there's a –

THE COURT: Well, it's right next to 3B or –

MR. BOCKOVER: It's 3B1.1, your Honor.

THE COURT: It's probably 3B1.2.

MR. BOCKOVER: That's correct.

THE COURT: Yes, it is. Counsel, I will allow you to make an oral motion, and I will allow you to proceed. I've already indicated that I'd be disinclined to grant that motion.

MR. BUTERA: Okay.

THE COURT: But I'll allow you to make it.

MR. BUTERA: I would just reiterate to the court that I believe that a mitigating role could be – that there could be a basis for it, either minimal participant or minor participant, minimal participant being a four-level decrease, minor participant being a two-level decrease or, if someone falls in the middle of that, a three-level decrease.

I would look to the testimony that was presented. Although Mr. Tidwell may have had an active role in the [28] conspiracy, he played a minimal part or a minor part in the conspiracy in the fact that, basically, he was a worker throughout.

I could anticipate an argument by the government saying, well, he's at meetings, he's carrying out punishment. Well, part of minor participants involved in the conspiracy are workers. They're at the low end. Security people, muscle men, enforcers, whatever you want to call them, that are on the low level of what is going on. And I think in the whole scheme of things, as to everything that was happening, that he would qualify for a mitigating role, and I would ask the court to at least do a two-level

decrease, if not a minimum role participant at a four-level decrease. Thank you, your Honor.

THE COURT: The court doesn't need argument from the government. As far as I'm concerned, he is neither a minimal participant or a minor participant under the whole scheme of things. I will find under the evidence that he was a seller on the street level for long periods of time at different intervals. He was with the leaders and was close to the leaders during the latter stages of the conspiracy, and he knew what was going on, and he participated in any way that he could, and it's simply he was slightly under them, but was more involved than the ordinary seller on the street. Even the seller on the street was not a minor participant under the ones that I've heard that are involved in this indictment. Several [29] were runners who also sold at one point in time. This defendant is not entitled to any decrease. Anything else, counsel?

(Which were all the proceedings had in the excerpt of the above-entitled cause on the day and date aforesaid.)

I certify that the foregoing is a correct transcript from the excerpt of proceedings in the above-entitled matter.

Mary T. Lindbloom

United States Court of Appeals,
Seventh Circuit.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Vincent EDWARDS, Reynolds A. Wintersmith,
Horace Joiner, Karl V. Fort, and
Joseph Tidwell, Defendants-Appellants.

Nos. 94-3805, 94-3833, 94-3952, 94-3953, 95-1358.

Argued Dec. 2, 1996.

Decided Jan. 30, 1997.

Before CUMMINGS, EASTERBROOK, and ROVNER, Circuit Judges.

EASTERBROOK, Circuit Judge.

An indictment charged that 20 persons, affiliated with the Gangster Disciples street gang, distributed cocaine in and near Rockford, Illinois. The leaders of this ring called themselves "The Mob". Five pleaded guilty; the remaining 15 were tried in three groups. Other panels of this court have affirmed the convictions and sentences resulting from two of these trials. *United States v. Evans*, 92 F.3d 540 (7th Cir.1996); *United States v. Russell*, Nos. 94-4000 *et al.*, 1996 WL 508598 (7th Cir. Aug. 30, 1996) (unpublished order). After their convictions in the remaining trial, Karl V. Fort and Reynolds Wintersmith were sentenced to life in prison, Joseph Tidwell to 312 months, Horace Joiner to 126 months, and Vincent Edwards to 120 months. Arguments that are variations on contentions made to the panels in *Evans* and *Russell* we

reject without additional verbiage. Many others we bypass because they do not affect the sentences. Precise calculations of drug quantity do not matter when the amounts are as large as they are here. Only one contention requires discussion: defendants' joint argument that the judge must sentence them as if all of the cocaine were cocaine hydrochloride (powder), because the jury's verdict does not unambiguously establish that they peddled any cocaine base (crack).

Count I of the indictment charged the defendants with conspiring to distribute cocaine and cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The instructions told the jury that it could convict the defendants under Count I if it concluded that the conspiracy "involved measurable amounts of cocaine or cocaine base." The jury returned a verdict of guilty – which means, appellants insist, that the verdict does not establish that they distributed any crack, for the jury would have returned the same verdict had all of the drug been powder cocaine. Because, on this understanding, "there is simply no way of determining from the general verdict which of the conspiratorial objectives the jury found beyond a reasonable doubt" (Appellants' Joint Br. 33), appellants ask us to require the prosecutor to elect between a new trial and resentencing on the assumption that all of the cocaine was powder. Defendants did not object to this part of the instructions or the verdict form, and they did not ask the court to elicit from the jury the information they now say is missing, so they argue now that the district court committed plain error. See *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

Five courts of appeals have held that, when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendants must be sentenced as if the organization distributed only the drug carrying the lower penalty. *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.1984); *Newman v. United States*, 817 F.2d 635 (10th Cir.1987); *United States v. Owens*, 904 F.2d 411, 414-15 (8th Cir.1990); *United States v. Bounds*, 985 F.2d 188, 194-95 (5th Cir.1993); *United States v. Garcia*, 37 F.3d 1359, 1369-71 (9th Cir.1994). *Newman* held that the shortcoming it identified is "plain error." 817 F.2d at 637 n. 3; see also *United States v. Pace*, 981 F.2d 1123, 1128 (10th Cir.1992). We believe that all of these decisions are wrong. There was no error, and hence no plain error, in this case.

Our reason is simple: under the Sentencing Guidelines, the judge alone determines which drug was distributed, and in what quantity. *Witte v. United States*, ___ U.S. ___, ___-___, 115 S.Ct. 2199, 2207-08, 132 L.Ed.2d 351 (1995); *United States v. Cooper*, 39 F.3d 167, 172 (7th Cir.1994); *United States v. Levy*, 955 F.2d 1098, 1106 (7th Cir.1992); U.S.S.G. § 1B1.2(d) & Application Note 5. The "relevant conduct" rule requires the judge to consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment. U.S.S.G. § 1B1.3; *United States v. Watts*, ___ U.S. ___, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); *United States v. White*, 888 F.2d 490 (7th Cir.1989); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L.Rev. 1, 8-12, 25-28 (1988). A judge therefore may base a sentence on kinds and quantities of drugs that were not considered by the jury.

United States v. Garcia, 69 F.3d 810, 818-19 (7th Cir.1995); *United States v. Montgomery*, 14 F.3d 1189, 1196-98 (7th Cir.1994); *United States v. Villarreal*, 977 F.2d 1077, 1080 (7th Cir.1992). Because sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal. *Watts, supra*. What a jury believes about which drug the conspirators distributed therefore is not conclusive – and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options.

Orozco-Prada, first in the line of contrary decisions, relied on a series of cases that address a different problem. Suppose the indictment charges that the defendants conspired to commit two crimes – say, bank robbery and money laundering – that have different maximum punishments. Because the punishment for conspiracy depends on the punishment for the substantive offense, 18 U.S.C. § 371; 21 U.S.C. § 846, a disjunctive verdict form (or a disjunctively phrased indictment) leaves unresolved the question whether the conspirators pursued both objectives and, if only one, which. The judge does not have authority to sentence the defendants to 20 years (the bank robbery maximum) if they conspired only to launder the proceeds of someone else's robbery. So unless the prosecutor consents to a sentence based on the lower maximum punishment, there must be a new trial. See *Brown v. United States*, 299 F.2d 438 (D.C.Cir.1962) (Burger, J.), among the several similar cases cited by *Orozco-Prada*, 732 F.2d at 1083-84. *Brown* and its successors reach an entirely sensible result but have nothing to do with an

indictment that charges the defendants with agreeing to commit *one crime* in *two ways*. Powder and crack cocaine are variations of the same drug sold to distinct segments of the retail market; the difference has consequences for sentencing under 21 U.S.C. § 841(b) and the Guidelines, but not for the identification of the substantive offense. Cf. *Chapman v. United States*, 500 U.S. 453, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991); *Neal v. United States*, ___ U.S. ___, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996). Section 841(a)(1) makes it unlawful "to manufacture, distribute, or dispense, or to possess with intent to manufacture, distribute or dispense, a controlled substance". That is the crime these five defendants conspired to commit. Application of the disparate sentencing rules for different types and quantities of controlled substances is for the judge rather than the jury. This is why it is unnecessary for the indictment to charge how much of a drug was involved, even though quantity matters greatly to the sentence. An indictment could charge the defendants with "conspiring to distribute controlled substances in violation of 21 U.S.C. § 841(a)" without identifying either the substances or the quantities. Defendants might well prefer this form of charge, if the alternative is multiple conspiracies for multiple drugs, with cumulative punishments. Cf. *United States v. Duff*, 76 F.3d 122 (7th Cir.1996). If the grand jury specifies details, the proof and the jury charge may not depart from them in a way that constructively amends the indictment. Compare *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), with *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985). See also *United States v. Leichtnam*, 948 F.2d 370, 378-81

(7th Cir.1991). But the indictment here identified both powder and crack; defendants do not argue variance.

Orozco-Prada did not mention the difference between conspiracy to commit two crimes, and conspiracy to commit one crime in two ways. It therefore applied the *Brown* principle uncritically. *Newman* relied on both *Brown* and *Orozco-Prada*, again without making the distinction. Neither *Orozco-Prada* nor *Newman* mentioned the difference between the jury's and the judge's roles. *Newman* even concluded that "the uncertainty taints the conviction itself" (817 F.2d at 639) and remanded for a new trial – a position since disapproved by *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991), and inconsistent with our conclusion in *United States v. Peters*, 617 F.2d 503 (7th Cir.1980), which the tenth circuit declined to follow, 817 F.2d at 638. Finally, *Owens*, *Bounds*, and *Garcia* relied on *Orozco-Prada* and *Newman* without independent analysis.

In *United States v. Banks*, 78 F.3d 1190, 1201-04 (7th Cir.1996), we held (following *Peters*) that there is no problem when the instructions are phrased in the conjunctive, for then the jury necessarily finds that the defendants distributed all of the drugs identified in the indictment. Now we add that there is no problem when the instructions are phrased in the disjunctive, because (subject to the variance possibility discussed above) as long as the jury finds that the defendants conspired to distribute *any* drug proscribed by § 841(a)(1), the judge possesses the power to determine which drug, and how much. Our conclusion has the support of holdings in the eleventh circuit, see *United States v. Williams*, 876 F.2d 1521, 1525 (11th Cir.1989); *United States v. Dennis*, 786 F.2d 1029,

1038-41 (11th Cir.1986), although not of all the language in these opinions. *Dennis* expressed a preference for obtaining a special verdict from the jury – and even so was disapproved by *Newman* for holding that the judge could make an independent decision about the type and quantity of drugs involved – but we see no reason to put an extra question to the jurors, whose tasks are complex enough when trying to address the questions that the law commits to them. *Williams* could perhaps be distinguished on the ground that it involved a request for a lesser-included-offense instruction, but its holding – that the defendant is not entitled to this instruction, because distributing powder cocaine cannot be a lesser included offense of distributing cocaine base when the two are the *same* offense – establishes the same principle on which we rely. Whether the conspiracy deals different drugs or different forms of the same drug is not pertinent. A charge that the conspirators agreed to distribute marijuana, cocaine, and heroin identifies only a single crime – for the conspiracy is the *agreement* and not the distribution, see *United States v. Shabani*, 513 U.S. 10, 115 S.Ct. 382, 130 L.Ed.2d 225 (1994) – and the judge is free to determine after the verdict which penalty is appropriate in light of the types and quantities of drugs handled. A conflict among the circuits was apparent after the tenth circuit's disapproval, in *Newman*, of decisions from the seventh (*Peters*) and eleventh (*Dennis*), and may well have been implicit in our decisions about the allocation of authority between judge and jury. But because our decision makes the scope of the conflict so clear, we have circulated this opinion to all active judges under Circuit Rule 40(e). A majority did not favor a hearing en banc.

Circuit Judge Ripple voted in favor of hearing this case en banc.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 96-8732

Vincent Edwards, Reynolds A. Wintersmith, Horace Joiner, Karl V. Fort, and Joseph Tidwell,

Petitioners

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

October 20, 1997
